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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

MARCH AND OCTOBER TERMS, 1917.

VOL. 115.

REPORTED BY

ROBERT POWELL

COLUMBIA, MISSOURI
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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1917.

GULFPORT TURPENTINE CO. *v.* STRICKLAND.

[75 South. 689, Division A.]

COST. *Taxation. Amount recovered.*

Under section 706, Code 1906, so providing, where plaintiff sues in the circuit court and does not recover judgment for more than two hundred dollars, cost should be taxed against him unless the judge shall be of the opinion and so enter on the record that the plaintiff had reasonable ground to expect to recover more than two hundred dollars or unless the court shall have jurisdiction of the cause, without respect to the amount in controversy.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Suit by C. J. Strickland against the Gulfport Turpentine Company. From a judgment for plaintiff, defendant appeals.

Appellee, who was plaintiff in the court below, brought suit in the circuit court against appellant, alleging that he had a contract with appellant for one year's work, and that, after working seven months, he was discharged by the appellant, and therefore damaged to the extent of five months salary at fifty-five dollars a month, making two hundred and seventy-five dollars, and eight dollars and twenty-seven cents expense incurred in seeking other employment. It developed on the trial in the circuit court that he found other employment, and, after crediting him with the amount received from such employ-

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ment, he was given judgment for one hundred and sixty-five dollars, and court costs were taxed against the defendant.

Section 706 of the Code, referred to in the opinion, reads as follows:

"If a suit shall be brought in the circuit court for a sum less than the court can take cognizance of, or if a greater sum than is due shall be demanded, on purpose to confer jurisdiction the plaintiff shall be nonsuited; and if the plaintiff, in any case, shall not recover more than two hundred dollars, he shall not recover any costs of the defendant unless the judge shall be of the opinion, and so enter on the record, that the plaintiff had reasonable ground to expect to recover more than two hundred dollars or unless the court shall have jurisdiction of the cause, without respect to the amount in controversy."

Barret & Cowan and *J. L. Taylor,* for appellants.

Appellee practically concedes that he is not entitled to recover the costs. The authority cited is sufficient we think to prevent his recovering costs.

In the case of *Switzer* v. *Benny,* 94 Miss. 209, 48 So. 401, the court held that jurisdiction could not be given even by consent of the parties. In *Hurd* v. *Tombes,* 7 Howard 129, the court said that a court cannot exercise a jurisdiction contrary to the constitution even by consent. Certainly if it cannot be exercised by consent it could not by waiver of any kind. In the 72 Miss. 291, we find that the court will of its own motion see to the jurisdiction. In the 52 Miss. 694, we find the supreme court to have given the true test of jurisdiction as follows: The amount after deducting credits is the test of the jurisdiction.

The above cases certainly ought to settle this case that the circuit court did not have jurisdiction of this case. The appellant did not have the right to file his

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suit for and demand the said sum of two hundred and seventy-five dollars before the term of his contract had expired; but he did have the right to file a suit at the end of each month for what the appellee was due him for that month, which would have been the contract price less his earnings that month, to be credited, assuming that he was discharged without cause which we in nowise concede. If he chose to make one suit only then he should have waited until he knew what his demand would be.

So when the jury returned the verdict for one hundred and eighty-three dollars and on motion of appellee the appellee remitted down to one hundred and sixty-five dollars he admitted that one hundred and sixty-five dollars was all he was entitled to and which is under circuit court jurisdiction and should have been filed in justice court and not in the circuit court. See 52 So. 208.

And so we might cite many other cases with reference to the jurisdiction but it appears so manifest that this suit was brought in the wrong court until we deem it useless to make other citations; thus we seriously contend that the case should be reversed and dismissed.

D. M. Graham, for appellee.

It is only cases where parties attempt to commit fraud on the jurisdiction of the court that will be nonsuited. The purpose to evade the law must be present and the authorities hold this. Sec. 706, Code 1906, and authorities cited. Besides if the court please, this question is one which should have been raised in the court below; no hint of this jurisdictional question was mentioned either in the pleadings, evidence or motion for a new trial, and the point cannot be raised for the first time in this court. There is nothing in the record that would even tend to prove that the appellee when he brought his suit in the circuit court had any intention of trying to impose upon the jurisdiction of the circuit court his *bona-fide*

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claim at the time the suit was filed, was more than two hundred dollars at that time he had only earned about twenty-seven dollars; he could have filed his suit immediately after his discharge for the full amount of his salary for the balance of his term and as stated several times before, his earnings during the balance of the term was a matter for the appellant to set up as a defense. *Pritchard* v. *Martin,* 27 Miss. 305, *prima-facie,* the amount of the claim was the amount of the salary due for the balance of the term of the contract after the discharge. *Odeneal* v. *Henry,* 70 Miss. 172; See 26 Cyc. at page 998, and following and especially page 1006 at (3) under 6, evidence.

We have not burdened the court with a great list of authorities, which of course could be done, the law is simple and the trial court having submitted the question to the jury, under proper instructions, this court will not reverse.

We must confess however to this court that we overlooked in the trial of the cause below to ask the court to certify on the record under section 706 of the Code that the plaintiff has reasonable ground to believe that he would recover more than two hundred dollars; we believe however, that such a certificate was unnecessary in the case at bar, because that section was intended as held in *Railroad Company* v. *Mabry,* 7 So. 234, to discourage resort to the circuit court in cases in which relief may be fully secured in justice courts; while that case holds that the section referred to applies to actions *ex contractu,* the same reason that applies in that case would apply here; this case at bar is hard to determine as between its character as an *ex contractu* suit and *ex delicto;* surely the amount when suit was filed was unliquidated and the appellee nor the appellant could then tell what amount would be recovered; if the court holds however that a certificate of the trial judge was necessary to carry costs of the said section 706, we respect-

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fully ask the court to enter such judgment as will meet the situation; the case would not be reversed because this certificate was not made but would only require us to enter a *remittitur* as to the cost.

SMITH, C. J., delivered the opinion of the court.

We find no reversible error in the matters complained of on the merits, but, since it does not appear from the record that the trial judge was of the opinion that the plaintiff had reasonable grounds to expect to recover more than two hundred dollars, the costs in the court below must, under section 706 of the Code, be taxed against appellee. The judgment of the court below therefore will be reversed, and judgment entered here in accordance with that entered below, except that the court costs therein incurrd will be taxed against appellee.

Reversed in part, and affirmed in part.

KELLY ET AL. v. APPLEWHITE ET AL.

[75 South. 753, Division A.]

CORPORATIONS. *Stockholder's action against directors. Sufficiency of bill. Right to sue.*

A bill by the stockholders of a bank against the directors for the book value of the stock is not demurrable where it alleges that the directors, by their misconduct, rendered the stock valuless, that the receiver had declined to bring the suit and showed that he was not a necessary party for which reason he was not joined in the suit, as a party defendant.

APPEAL from the chancery court of Attala county.

HON. A. Y. WOODWARD, Chancellor.

Bill by Carrie Applewhite and others against C. C. Kelly and others. Demurrer to bill being overruled, defendants appeal.

The facts are sufficiently stated in the opinion of the court.

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Green & Green, R. H. & J. H. Thompson, O. A. Luckett, J. A. Niles, T. P. Guyton and *Dodd & Allen,* for appellant.

L. Brame and *J. A. Teat,* for appellees.

SYKES, J., delivered the opinion of the court.

Carrie Applewhite and others, appellees in this court, filed their original bill in the chancery court of Attala county against C. C. Kelly and other defendants. The complainants were stockholders in a certain banking company domiciled at Kosciusko. The bill seeks recovery from all the directors of the bank for the "book" value of their stock, as shown by the books of the bank. The gravamen of the bill is the neglect of duty, misconduct, and negligence of the directors, causing the bank to become insolvent and have to go into the hands of a receiver, thereby rendering their stock valueless. General and special demurrers were interposed to the bill and ovrruled by the chancellor. We deem it unnecessary to set out the allegations of the bill or the grounds of demurrer. The same questions raised on this appeal have all been settled by this court in the cases of *Ellis* v. *Gates,* 103 Miss. 560, 60 So. 649, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915B, 526, *Ventress* v. *Wallace,* 111 Miss. 357, 71 So. 636, L. R. A. 1917A, 921, *Bramlette* v. *Joseph,* 111 Miss. 379, 71 So. 643, *Metzger* v. *Joseph,* 111 Miss. 385, 71 So. 645, and *Orlansky* v. *Johnson,* 74 So. 113.

The bill alleges in this case that the receiver was requested to bring this suit, but declined. It states facts, however, which show that he is not a necessary party to the suit, and, for that reason, was not joined as a party defendant. The learned chancellor was correct in overruling the demurrers. The case will therefore be affirmed and remanded.

Affirmed and remanded.

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HUNTER v. FORREST.

[75 South. 753, Division B.]

1. EXECUTORS AND ADMINISTRATORS. *Right to possession of property against claim of third party. Protection of creditors. Statute.* Under Code 1906, section 4784, commonly known as our "sign statute," an administratrix could maintain replevin for a stock of furniture held by deceased, who conducted the business of a trader in his own name, although another person had actually furnished the money for purchasing the stock, since presumptively the administratrix had the right of possession until all the creditors of deceased were paid, and it was immaterial that no actual debts against the estate were shown, where the time allowed creditors to probate accounts had not expired.

2. SAME. In such case, where the property had been purchased by the defendant in the name of the deceased at the time of the bankruptcy of defendant's husband, and the husband had turned over his exemptions to deceased, and there was no distinction between this property and that purchased by the wife in deceased's name, and since the creditors could have proceeded against the stock during deceased's life, their rights must be protected, after his death.

3. SAME. In such case, it was immaterial that the heirs of deceased had no right to the stock, or that the bankrupt's wife, the real owner, could claim the property or any surplus thereof, after deceased's debts had been paid; the right of possession of the administratrix, upon which the cause of action depended being superior to that of the true owner of the stock, solely because of section 4784, Code 1906, and because the administratrix represents the interest of creditors.

4. BANKRUPTCY. *Bankrupt's right to dispose of exempt property.* After a bankrupt has successfully claimed property as exempt he has the right to dispose of it as he sees proper.

APPEAL from the circuit court in Leflore county.

HON. F. E. EVERETT, Judge.

Replevin by Mrs. Homer B. Forrest, administratrix of the estate of Homer B. Forrest, deceased, against Mrs.

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Annie Hunter. Judgment for claimant allowing recovery of part of the property involved, defendant appeals and claimant cross-appeals.

The facts are fully stated in the opinion of the court.

J. W. Bradford, for appellant.

The only question involved in this suit is, to whom does the property herein involved belong? And in answer to that, in view of the testimony in this record we submit that the evidence conclusively shows that all the property involved in this suit belongs to the appellant.

Mr. H. B. Forrest was an agent by agreement for Mrs. Hunter in all transactions connected with the furniture business in Itta Bena from March 11, 1915, the date which the trustee sold the goods until his death, April 22, 1915. Therefore all contracts that he made in connection with the furniture business inured to the benefit of Mrs. Hunter, the appellant.

Where an agent purchases property for his principal in the course of business, such property belongs to the principal. This rule is well laid down in 2 C. J., page 705, wherein it says: "Purchasing agents must not purchase for himself. As a general rule, the agent must not, without the principal's full knowledge and consent, purchase for himself, property which he is employed to purchase for his principal. If he does so, it is a breach of faith, and he will be regarded as holding the property so purchased, although purchased in his own name, or its proceeds for his principal, although he contributes his own funds to the purchase. This rule is held to apply, although the agent has no actual authority to purchase it at the time of the purchase."

The judgment of the lower court was correct in instructing the jury to award to the appellant all of the property involved in this suit except that part of the ruling of the court in instructing the jury to award to

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the plaintiff the amount of James Hunter's exemption. As to this the court clearly committed error in instructing the jury to award to the plaintiff these exemptions because, if Mr. Forrest had purchased and paid for these exemptions when he took the same over from Chas. Posner's store under the law as laid down in C. J., *supra,* the same would immediatedly become the property of Mrs. Hunter. It is shown conclusively that he was acting as agent in this matter for Mrs. Hunter; that he was acting for her when Chas. Posner gave his receipt for an itemized statement of these exemptions and marked the same paid at the same time that they were transferred from his store to the store of Mrs. Annie Hunter, and beyond question in view of the testimony in the record, showing that the stock of goods was the property of Mrs. Hunter, Forrest was merely lending his name for Mrs. Hunter's convenience, then the exempt property became the property of Mrs. Hunter without any further transaction being necessary regarding it. The title to property received by an agent is in the principal, and the principal may maintain replevin therefor. 2 C. J., page 888.

H. B. Forrest, having died before this suit was instituted, the best evidence of his connection with this furniture store was in declarations he made regarding his connection with the business. No question was raised in the lower court as to the admissibility of this class of testimony. Declaration against interest and in disparagement of title to either real or personal property are competent evidence and have been so held in numerous authorities in this state, beside authority from several states. Declarations in disparagement of title or in explanation of the ownership of property both real and personal are held admissible. See the following cases: *Brown* v. *McGraw,* 12 S. & M. 267; *Graham* v. *Bushby,* 34 Miss. 272; *Walker* v. *Marsailles,* 70 Miss. 287, 12 So. 211; *Spears* v. *Burton,* 31 Miss. 547; *Henderson* v.

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Cargill, 31 Miss. 367; 16 Cyc. 1219; Ency of Evid. page 89; *Bradley* v. *Stofford,* 23 N. H. 444; 4 A. & E. Ency. of Evid., page 91; *McLeod* v. *Swain,* 87 Ga. 156; 27 Asr. 229.

Under the testimony in this case, our opponents are bound to concede that Mr. H. B. Forrest was acting for Mrs. Hunter, as her agent in lending his name, under which was conducted this furniture business, and while so acting, he received from Chas. Posner, the exemption of James Hunter in the matter of the agreed value of two hundred dollars.

In view therefore of the law and the testimony in this case, this exempt property under this agency immediately became the property of Mrs. James Hunter, and was a part and parcel of the rest of the stock of merchandise and furniture and was not in any way directly or indirectly the property of Mr. Forrest.

The court therefore erred in instructing the jury to award to Mrs. Forrest this exempt property.

Monroe McClurg, for appellant.

Of the several undisputed facts disclosed by the record or agreed to in this cause, one of them in that the dead man, Forrest, did not transact the business, and another is, even though it seems to have traveled along through the entire trial unnoticed, that there were no debts against the business by whomsoever transacted, managed, carried on or conducted, because the record is clear and altogether undisputable that the price bid at the open public sale made by the trustee in bankruptcy for the bankrupt stock was paid and that every time a bill was made to replenish the old stock a check was drawn to meet it. Is it not a correct statement to make that section 1300, nor any of its successors down to 4784, has never been appealed to without the statement or showing in some form of the obligation to be protected

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by it? And, must it not be also shown, established, that there is an actual living obligation that has some reference to the business being transacted? "A little paste board sign Posner put up just for fun and which blew down in a few days." This honorable court will hardly allow countenance to mere possibilities and vague imaginations. There is not in this entire record a suggestion of the remotest character that there was in either fact, probability, or possibility in existence a claim against Mr. Forrest that provoked the statute relied upon by opposing counsel. Hence, it is most respectfully urged, the claim to representative protection of creditors under that law must fail. And, if so, according to their honorable statement of their cases, their case is lost. It is further clear that they had no other basis upon which to predicate the action of replevin, for all the proof and all the open and candid agreements between counsel is that there was not and could not be a single glimmer of a chance for the heirs, because all argee that Mr. Forrest never had a cents worth of interest in any item of the property. Section 4784, a law that most probably has hurt more people than it has helped could not help the heirs in the instance case. Mrs. Hunter and her heirs are happily protected by the facts indisputably disclosed on that proposition.

Now, if the above argument is sound, and it is of course believed to be, the trial court was right in directing the jury to award to Mrs. Hunter all of the property purchased by her at the trustees sale. And, it follows in legal and logical sequence that, the court erred in directing the jury to award to the administratrix the personal property which had been set aside to Mr. Hunter as exempted to him by law from every sort of legal process, except that for the purchase money which did not in anywise enter into the case. If there is any proposition put by the statute and decisions of this state beyond the reach of dispute, it is that a man may do what he pleases

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with the property mercifully exempted to him for the maintenance and support of his family. Nor in any such case can such property be reached by section 4784. It had been lawfully selected by him, lawfully delivered to him, lawfully segregated from the bulk of the bankrupt stock and stored away in his friendly neighbor's store who did not even charge him storage or commissions on the small portions thereof sold for him.

Hill & Witty, for appellee.

The appellant and cross-appellee devotes her entire brief to the one proposition that according to the evidence in this case, H. B. Forrest, bought and held possession of the property in controversey merely as the agent of Mrs. Hunter. For the purpose of this appeal we do not care to deny this. As between the parties, Mrs. Hunter and H. B. Forrest, this may have been true. But this is a contest between Forrest's administratrix and Mrs. Hunter. The administratrix is the representative of Forrest's creditors. As a proposition of law this is so elementary that we do not deem it necessary to cite any authorities in support of the statement. When the administratrix qualified, by virtue of section 2026 of the Code of 1906, she was required to take oath that she would pay the debts of the decedent; by section 2056 of the Code, all personal property of the decedent is declared assets of this estate liable to his debts; by section 2095 of the Code, the administratrix is authorized and required to bring proper suits for the recovery of personal property belonging to the estate; by sections 2104 and 2105 of the Code, the administratrix was required to pay the taxes, and any other debts owing by the decedent. It is perfectly clear that Mrs. Forrest, when she became administratrix, was a mere officer of the court, the representative of creditors of the estate primarily, and secondarily the representative of the heirs. As stated above,

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this is elementary law, (11 R. C. L. pp. 23-24-25), and it was not only her right but it was her duty to recover and collect all assets belonging to the estate of the decedent which were subject to the decedent's debts (11 R. C. L. P. p. 267). Moreover, she, herself, would have been liable had she been guilty of any negligence in this regard.

Opposing counsel in his argument does not take into account section 4784 of the Code of 1906, commonly referred to as our "Business Sign Statute." This statute has been construed so often by our court that its meaning and significance are perfectly clear. We submit that when the property in controversy remained in the storehouse up to the instant of Forrest's death as a part of a business which was being run in Forrest's name, that it became liable to the debts of H. B. Forrest, and was so liable at the instant of his death. There was a sign "H. B. Forrest" in front of the store; all goods were bought and paid for in his name; the bank deposits were made, and checks were drawn by him; to all appearances the business belonged to H. B. Forrest, and it was being run in his name.

This is abundantly proved by the testimony of James Hunter and by the testimony of Charles Posner. H. B. Forrest was held out to all the world as the owner of the business, and even though he had had no sign whatever, by virtue of section 4784 of the Code, his creditors, at the instant of his death, had the right to levy upon the property in controversy as his, and to subject it to the payment of their debts, because no sign disclosed his agency for Mrs. Hunter, and the agreement of agency between them was not of record.

As stated above, section 4784 has been repeatedly construed by this court. In the case of *M. & F. Bank* v. *Schaff*, 66 So. 402, this court reviewed and discussed the authorities, and the decision in that case is in line with the previous holdings of this court. In the case of *Gal-*

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lapsy v. *Harvester Co.*, 67 So. 904, certain property, title to which was in the Harvester Company was delivered to the retail merchant, and used and acquired by it in its business without a proper sign to show the true ownership of the property. Subsequently the merchant became a bankrupt, and the trustee in bankruptcy replevied the property from the Harvester Company, claiming the right of possession by virtue of section 4784 of the Code. This court held in that case that, on account of the Business Sign Statute, the property was subject to the debts of the merchant, and that the trustee in bankruptcy, standing in the shoes of the creditors, was entitled to the possession of the property. In the case of *Hardware Company* v. *Harvester Company*, 70 So. 892, virtually the same issue was presented, except that the contest was between a receiver and the true owner of the property, and in that case, too, the sign statute was invoked, and the receiver was awarded the property.

We submit that the authorities mentioned above are decisive of this case. The administratrix, like the trustee in bankruptcy, and the receiver in chancery, stands as the representative of creditors. Certainly all the property in controversy at the instant of Forrest's death could have been levied upon by his creditors as his. If this be true then the administratrix certainly is entitled to the possession of the property in order to apply it to the payment of the decedent's debts. Forrest died on April 22, 1915, and his administratrix qualified sometime prior to the filing of this suit on May 17, 1915. The record does not show whether any publication to creditors in accordance with section 2103 was made or not, but this case was tried in November, 1915, and even if publication had been made immediately after the administratrix qualified, the creditors would still have had several months in which to probate their claims against the estate after this case was decided by the trial court.

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We submit that the trial court committed no error in awarding to the administratrix the exempt property, but that error was committed in not giving peremptory instruction for the administratrix as to all the property involved, the value of which was filed by agreement at seven hundred and sixty-nine dollars and ninty-five cents. We submit that the plaintiff, Mrs. Forrest, as administratrix, is entitled to judgment in this court for all the property involved, or, if not to be had, for the full value thereof, seven hundred and sixty nine dollars and ninty-five cents.

STEVENS, J., delivered the opinion of the court.

The facts of this case are not in dispute. The record shows that one James Hunter was, prior to March, 1915, engaged in the furniture business in the town of Itta Bena. He became financially involved, filed a voluntary petition in bankruptcy, and his estate was duly administered in and by the bankruptcy court. Hunter was permitted to claim two hundred and fifty dollars worth of his stock of furniture as exempt, and certain articles of furniture were accordingly set apart to him as exempt. The articles of furniture chosen or selected as exempt were removed from the main stock of goods and placed by Mr. Hunter in the store of his neighbor merchant, one Chas. Posner. Thereafter the trustee in bankruptcy offered the stock of goods for sale and sold the same to the highest bidder. Mrs. Annie Hunter, the wife of the bankrupt, desired to bid on this stock of goods, and to this end gained the consent of Mr. H. B. Forrest to appear at the sale and bid in the stock in Forrest's name but for the use and benefit of appellant who furnished the consideration. Mr. Forrest bid the sum of two hundred and eighty dollars for the remaining stock, and thereafter by agreement with Mrs. Hunter the furniture business was renewed in the name of H. B. Forrest, but

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with funds advanced by Mrs. Hunter. The name of H. B. Forrest appeared at the place of business, also checks were drawn by him, the bank account was kept in his name, and so far as the public was concerned H. B. Forrest was the owner of the business. It appears that Mr. Forrest himself had little to do in conducting the business, but James Hunter, the former bankrupt, did the clerking and managed the business. After Forrest bought the stock, James Hunter turned over to him the articles of furniture which he had selected as exempt, and these exempt articles thereupon became a part of the stock. It appears that James Hunter delivered his exempt property for the purpose of stocking the furniture business, and placed the articles in the store for the purposes of sale. During the month of April, 1915, Mr. Forrest died, intestate, and thereafter his wife, the appellee herein, was appointed administratrix of his estate. Mrs. Forrest thereupon, as administratrix, asserted her right to the possession of the stock, and instituted this action of replevin against James Hunter; and Mrs. Annie Hunter thereupon filed a claimant's affidavit, contending that she was the owner of the business and had the right to the possession. Mrs. Hunter, the claimant, executed a bond and took possession under and by virtue of her claimant's bond. On the trial of the claimant's issue in the circuit court, there being no controversy about the facts, the trial judge peremptorily charged the jury to find for the claimant as to all property involved in the suit, except the exempt property before that time selected by James T. Hunter, list of which is in evidence, and the specific articles were set out in the instruction. From the judgment entered in pursuance of the peremptory charge, Mrs. Hunter prosecutes a direct appeal; while Mrs. Forrest, as administratrix, prosecutes a cross-appeal.

Mrs. Hunter claims that she is the principal, that she furnished the entire consideration for the purchase of

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the stock, and all moneys with which the business was conducted and is the full owner. Mrs. Forrest invokes section 4784 of the Code, commonly known as our "sign statutes," contends that by virtue of this statute H. B. Forrest's estate is liable to creditors, that the creditors of H. B. Forrest have a right to satisfy their demands from the proceeds of the sale of the stock, and that she, as administratrix, represents her deceased husband's creditors, and therefore has a right to the possession of the stock for the benefit of creditors. The record does not disclose probated debts against the estate of H. B. Forrest, deceased, but letters of administration had been recently granted, and the time for probating accounts had not expired.

If this were a contest solely between Mrs. Hunter and H. B. Forrest or the representatives of H. B. Forrest, it may be conceded that appellant should prevail. But Mrs. Forrest institutes this action as the administratrix, and as such she represents the interest of creditors of H. B. Forrest, deceased, and is charged with the duty of bringing needed suits for the recovery of property or for the collection of debts owing the decedent. In our judgment, section 4784, Code of 1906, is applicable, and the creditors of H. B. Forrest have a right to proceed against the stock. If the creditors of H. B. Forrest could levy upon this stock during his lifetime they should be accorded the right to satisfy their demands out of the proceeds of the stock after his death. The stock under the statute stands charged with the debts of the ostensible owner, and this record shows that to all appearances the business belonged to H. B. Forrest, and was being operated in his name. The only uncertainty arises out of the failure of the record to show affirmatively that there are any creditors having provable accounts against the estate of H. B. Forrest, deceased. We are justified in assuming that the very purpose of the administration was to pay debts and at the

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same time conserve the equities of H. B. Forrest's heirs or representatives. The only sure way of knowing whether there are creditors is to take out administration, make legal publication to the creditors, and by complying with the statutes cause the statute of limitations, the time allowed creditors to probate accounts, to run against creditors having provable claims. This time at the trial of this suit had not expired. Presumptively Mrs. Forrest had the right of possession until all creditors are paid. We accordingly hold that the property should have been delivered to her to be disposed of under proper orders of the chancery court and for the purpose of paying the lawful debts of the decedent. We see no distinction to be made between the articles of furniture at one time claimed by James Hunter as exempt and the balance of the stock. The so-called exempt property was by James Hunter voluntarily turned over or delivered to H. B. Forrest for the purpose of stocking the business, and, when delivered, became merged in the stock as a part thereof, and liable for the debts of the business. After James Hunter had successfully claimed these articles as exempt, he had a right to dispose of them as he saw fit, and in the exercise of this right he elected to turn them over to H. B. Forrest for the use and benefit of his wife, Mrs. Hunter, the undisclosed principal. He put the articles in the store with the view of having them sold as part of the stock.

The main inquiry in this suit is: Who had the right of possession? We think the judgment should have been in favor of Mrs. Forrest, appellee and cross-appellant. In reaching this conclusion we are mindful of the fact, frankly conceded by counsel for appellee, that the heirs of H. B. Forrest have no right to the stock or the proceeds thereof. In delivering possession to the administratrix, then, it should be done without prejudice to the right of Mrs. Hunter, the real owner, to claim the property or any surplus thereof after the debts of H. B. For-

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rest are paid. We believe the rights of the parties can can well be conserved by proper orders of the chancery court. We see nothing to prevent the chancery court having jurisdiction of the estate of H. B. Forrest from keeping a separate inventory and account of this stock; and, after seeing that the probated debts are fully satisfied, the chancellor court could well direct any remaining portion of the stock or proceeds thereof to be delivered to appellant as the real owner. If insisted upon, the exemption claimed by the husband, James Hunter, could be dealt with separately and his rights as the legal owner of these articles fully protected. It is sufficient to say that in this proceeding the right of possession of Mrs. Forrest as administratrix is superior, and this is true solely because of section 4784 of our Code, and because, further, Mrs. Forrest represents the interest of creditors. The result reached by us finds support in the recent cases of *Merchants' & Farmers' Bank* v. *Schaaf,* 108 Miss. 121, 66 So. 402; *Gillaspy* v. *Harvester Co.,* 109 Miss. 136, 67 So. 904; *Hardware Co.* v. *Harvester Co.,* 110 Miss. 783, 70 So. 892.

The judgment of the learned circuit court will be reversed on cross-appeal, and judgment entered here in favor of appellee, Mrs. Forrest, awarding her possession of the entire stock or the true value thereof, but without prejudice to the right of Mrs. Hunter to claim her equity in the property after the creditors of H. B. Forrest are satisfied.

Judgment here for cross-appellant.

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ILLINOIS CENT R. Co. v. AINSWORTH.

[75 South. 755, Division B.]

CARRIERS. *Loss of live stock. Evidence. Sufficiency.*

Where in an action by a shipper against a common carrier for damages to live stock resulting from alleged negligence in handling them, the evidence showed that the animals were not physically injured, but were in apparently good condition when delivered to the consignee; that in the stockyards from which the stock were shipped there had been a short time before they were placed there, a contagious disease similar to the disease contracted by the animals in question; that live stock shipped from the North to South in that season frequently suffered from shipping cold and that several days after plaintiff received them, several animals developed colds, followed by pneumonia and died, but there was no evidence that this condition resulted from the negligence of defendant, in such case a verdict for plaintiff was erroneous and the court should have given a peremptory instruction for defendant.

APPEAL from the circuit court of Copiah county.

HON. J. B. HOLDEN, Judge.

Suit by A. E. Ainsworth against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells, May & Sanders, for appellant.

We respectfully submit to the court that the court below erred in overruling the motion made by the defendant at the close of plaintiff's testimony to exclude the evidence and instruct the jury peremptorily to find a verdict in favor of the defendant.

This was an interstate shipment from the initial point at St. Louis, Illinois, to the City of Jackson, Mississippi, under an interstate contract of affreightment

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which is set out in full in this record, and the rights and liabilities of the shipper and of the carrier, with respect to the property transported by freight from one state to another is governed exclusively by the Federal law. *M. K. & T. R. R. Co.* v. *Harriman,* 227 U. S. 657, 57 L. Ed. 690; *Atchinson, etc., R. Co.* v. *Robinson,* 233 U. S. 173, 58 L. Ed. 901; *Atchinson, etc., R. R. Co.* v. *Moore,* 233 U. S. 182, 58 L. Ed. 906; *Ga. F. & A. R. Co.* v. *Blish Milling Co.,* 241 U. S. 190; *Cin. & N. O., etc., R. Co.* v. *Rankin,* 241 U. S. 319; *Amer. Silver Mfg. Co.* v. *Wabash R. R. Co.,* 156 S. W. 830. The effect of the Carmack amendment was to give to the Federal jurisdiction control over interstate commerce and to make the Federal law supreme in all interstate shipment of freight or express. *Atl. & C. L. R. R. Co.* v. *Thomasville Live Stock Co.,* 79 S. E. 162; *C. N. & T. P. R. R. Co.* v. *Rankin,* cited *supra.*

It is a well settled principle of law that the burden of proof is on the party who has the affirmative of the issue. The only difficulty arises in a determination of the question as to whether or not in a particular case, a fact must be pleaded and proved by the plaintiff as a part of his cause, or by the defendant as an affirmative defense.

This is an action against the appellant carrier by the shipper to recover damages for loss and injury to live stock being transported, and the burden of showing that the stock was injured while in the possession and custody of the carrier, was on the shipper.

We recognize the general rule that when a loss or injury happened to live stock while in possession of a carrier for transportation, that the burden of proof rests on the carrier to exempt itself from liability, because of the fact that the law imposes on the carrier the obligation of safety, and in order to make out a *prima-facie* case, the owner or shipper is not legally bound to prove more than that the stock were delivered to the carrier in good condition and the failure of the carrier to deliver them

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safely, and that these facts, when reasonably established, would be *prima-facie* evidence of the negligence or misconduct.

But in the instant case, at the close of the plaintiff's evidence he had failed to make out a *prima-facie* case of liability.

It is the well-settled rule of law that where the injuries complained of are physical and apparent, the shipper will satisfy the rule requiring him to show an injury to his stock before the burden is cast upon the carrier to exonerate itself by establishing that the stock were delivered to the carrier in good condition, and redelivered by the carrier in an injured condition. But where the injury complained of is sickness, a shipper does not satisfy the rule unless he goes further and shows that the illness of the animals was contracted as a result of the negligence of the carrier. The rule requiring the carrier to exonerate itelf where the animals were delivered in good condition and were redelivered in an uninjured condition, is recognized by this court in the case of; *L. & N., etc., R. R. Co.* v. *Bigger,* 66 Miss. 319, 6 So. 235; *I. C. R. R. Co.* v. *Teens,* 75 Miss. 147, 21 So. 706.

The carrier is not required to prove that injuries to stock were or were not the result of some specific, direct, proximate cause. Proof that it provided all suitable means of transportation and exercised that degree of care which the nature of the property required, is the full extent of the burden cast upon it. *W. R. R. Co.* v. *Johnson,* 114 Ill. App. 545; *Thomas* v. *Wells Fargo Ex. Co.* (Tex., 95 S. W. 723.

A shipper must show an injury to the stock shipped before the burden is cast upon the carrier to exonerate himself, and the injury is not shown where the stock shipped were proven to have been delivered to the carrier in good health and condition, and to have been redelivered to the shipper in a sick and debilitated condition, but with no fractures, wounds, abrasions or other exter-

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nal or visible injuries. *Hussey* v. *Saragossa,* 12 Federal Cases, No. 6949; *Pa. R. R. Co.* v. *Raiordon,* 4 Amer. State Rep. 670; *St. L., etc., R. R.* v. *Brosins* (Tex.), 105 S. W. 1131; See, also, *Schaefer* v. *Phil. R. R. Co.,* 168 Pa. St. 209, 47 Amer. St. Rep. 884; *Jones* v. *Minn. & St. L. R. Co.,* 91 Minn. 229, 103 Amer. St. Rep. 507.

H. J. Wilson, for appellee.

Appellant relies upon three grounds for the reversal of this case, and I shall treat them in the order in which they appear in the record.

First, it is contended that the court erred in refusing to grant an instruction limiting the value of the horses and mule which died. It was testified that the value of the horses and mule which died was about three hundred and forty five dollars. The verdict was for one hundred and seventy-five dollars only. A large part of the damage consisted in the feeding of several head of stock during their illness and in the payment of veterinary charges. The appellant could not have been damaged by reason of the court refusing to grant this instruction, because the amount allowed by the jury was not as much as the limit of valuation put in the contract.

In the second place, it is contended that the court erred in refusing to charge the jury that unless the plaintiff filed written notice of damages supported by affidavit with an agent of the company, then they should find for the defendant. In answer to this proposition we would call the court's attention to the fact that the original declaration was filed within ten days after plaintiff discovered his injury, and this was a substantial compliance with the provisions of the contract. Aside from this, however, upon examination of the contract we find there is no consideration supporting the provision with reference to the valuation of the stock, or the provision with reference to the filing of notice of claim for damages with

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the company. These identical questions were before the court in the cases of *Railroad* v. *Harriman Bros.*, 227 U. S. 657; *Railroad* v. *Bell*, 111 Miss. 82; *Bernstein* v. *Y. & M. V. R. R. Co.*, 72 Rep. 132, and were there settled by the court adversely to the contention of appellant here. The trial court in refusing to grant instructions Nos. 1 and 2 for appellant followed the rule settled by this court in the above cases and therefore committed no error.

The third contention of counsel for appellant is that the proof offered by the plaintiff did not make out a *prima-facie* case of negligence on the part of appellant, and the court therefore erred in refusing to grant a peremptory instruction. We need only to review the facts with reference to how this car of live stock was handled to be convinced that the only reasonable explanation of why so large a number of the stock became ill is that they were exposed unduly to cold in shipment.

It is contended by counsel for appellant that the evidence fails to show that the sickness of the horses was the result of the manner in which they were handled. In answer to this we say the testimony shows that these animals were well and in good condition at the time they were delivered to the Railroad Company. They were apparently well upon arrival at Jackson, Mississippi, but in a short time all of them became sick and a large number of them seriously sick. The sickness was such as results only from exposure to cold. The only exposure within any reasonable time prior to the breaking out of the disease was that at Water Valley. This was a question of fact properly to be left to a jury and it seems to us that no other reasonable conclusion could have been reached by the jury. The court properly left this question of fact to the jury and their finding must be conclusive.

I therefore submit there was no error committed by the court below in the trial of this case, and the same should be affirmed.

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COOK, P. J., delivered the opinion of the court.

Appellee, plaintiff below, recovered a judgment against appellant, a common carrier, for damages to horses and mules resulting from alleged negligence in handling a carload of horses and mules from East St. Louis to Jackson, Mississippi. The evidence does not show that the horses and mules had been physically injured, but, on the contrary, they were apparently in good condition when they arrived at their destination and when they were delivered to the consignee. The evidence for plaintiff is to the effect that some two or three days after he had received the animals several of them developed colds, followed by pneumonia, and subsequently died from this disease. The defendant assumed the burden of proving that the stock were carefully handled from East St. Louis to Jackson, that the train was carefully handled, and that the stock were taken from the car at Water Valley, placed under a shed, and there fed and watered.

We can find nothing in the evidence which can be said contradicts the evidence introduced by the defendant. True, the plaintiff, and another witness, testified that about ten days after the stock were delivered at Jackson they went to Water Valley and examined the yard and shed; that the sides of the shed were not boarded up and made impervious to rain; that the rain had been blown through the open sides of the shed, and there was mud and slush under the shed. From this testimony the jury was asked to believe, and evidently did believe, that the horses and mules were standing in mud and water and exposed to the rain blowing under the shed when they were taken off the train ten days before the inspection of the surroundings by plaintiff's witnesses.

The evidence shows that nothing occurred at Water Valley which could have injured the stock. They were apparently in good condition when they reached Jackson; there was no evidence which would justify a reasonable

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belief that the stock had been exposed to the weather or had been stood in the mud and slush.

From this record it clearly appears that these horses and mules took cold, which progressed into pneumonia, but there is no reason to believe that this condition resulted from the negligence of defendant. The evidence does show without contradiction that live stock shipped from the North to the South at the season these animals were shipped almost always suffered from what is known as "shipping cold." There was some evidence which tended to prove, that some time before these horses and mules were placed in the stockyards at St. Louis, a contagious disease had been discovered among the stock there confined. The disease was similar to the disease the mules and horses in question are said to have contracted.

The verdict of the jury was manifestly wrong. The court should have instructed the jury to find for the defendant.

Reversed and dismissed.

TERRY *v.* JOLLY.

[75 South. 756, Division B.]

ATTACHMENT. *Pleading. Variance.*

On the trial of an action of attachment, the plaintiff in order to succeed must sustain his alleged ground of attachment, and it will not help him to prove other grounds of attachment not alleged in his affidavit for attachment.

APPEAL from the circuit court of Lawerence county.

HON. A. E. WEATHERSBY, Judge.

Attachment suit by O. G. Jolly against G. R. Terry. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

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C. E. Gibson, for appellant.

The first question necessarily arises from an investigation of the record on the attachment issue. Was this attachment rightfully sued out?

The appellant in this case was engaged in the saw mill business at a little place called Hooker on the Mississippi Central Railroad and from the very business in which he was engaged it seems that it was absolutly necessary for him to ship his lumber which he manufactured to points outside of the state, in order to do business. Now will a person thus engaged be held under the section under which this proceeding is instituted? This is a case as shown by this record where the sales are made in the regular course of business. "Ordinary sales in the usual course of business do not necessarily furnish grounds for attachment, although shipments are made to points outside of the state." 6 C. J., page 68. See also: *Stewart* v. *Cole,* 46 Ala. 646; *White* v. *Wilson,* 10 Ill. 21; *Herman Goepper* v. *Phoenix Brewing Co.,* 115 Ky. 708, 74 So. 726, 25 Ky. L. 84; *New Iberia Bank* v. *Martin,* 52 La. Ann. 1628, 28 S. W. 130.

"A shipment to a *bona-fide* creditor outside of the state of goods in payment of the debt is not a fraudulent removal warranting attachment." 6 C. J., 68.

"The removal which the statutes contemplate as a ground for attachment is a permanent taking away and not mere temporary removal or use of the property by the owner outside of the state." 6 C. J., 68 *Lowenstine* v. *Bew.,* 68 Miss. 265, 8 So. 684, 24 Am. St. 269.

"A temporary removal in the course of trade will not furnish a ground for attachment." *Lyon* v. *Mason,* 4 Coldw. (Tenn.), 525; *Clinch River Mineral Co.* v. *Harrison,* 91 Cal. 122, 21 So. 660.

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G. Wood Magee, for appellee.

The attachment was rightfully sued out in this case. The mere fact alone that appellant was shipping lumber out of the state, and selling it would not be sufficient to sustain an attachment, but this fact taken in connection with the other facts and circumstances, to wit: appellants promise to pay on receipt of the returns from his sales of lumber, his refusal to carry out or make any effort to carry out these promises, etc., and his absolute insolvency at the time, was sufficient to sustain the attachment; and it would be foolhardy for any creditor to have waited longer on appellant under the circumstances.

Appellant admitted that he was shipping his lumber out of the state, selling it and receiving pay for it but was not applying any of the proceeds to the payment of appellee's debt.

He did pretend however that he had some oxen and a wagon subject to execution, but the record disproves him on this point. He did not know from whom he had bought the oxen which he said were subject to execution and could not describe them to the court while testifying. All who heard him knew that he was not telling the truth, but was merely dodging the question of his insolvency.

COOK, P. J., delivered the opinion of the court.

This suit was begun in the court of a justice of the peace, appealed to the circuit, and there a judgment was rendered against the defendant, and he has appealed to this court.

The action was begun by attachment upon the ground that defendant "has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, with the intent to defraud his creditors."

The evidence tended to show that defendant was running a sawmill and that he shipped his lumber out of the

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state; that he owed plaintiff and had not paid him. At this point plaintiff rested.

Defendant testified that he had shipped his lumber out of the state; that he had sold the same and used the proceeds in the payment of his debts. There was some dispute as to the amount of defendant's indebtedness to plaintiff.

As we view the record, there is no evidence tending to prove the alleged ground of attachment. The trial seems to have proceeded upon the theory that, if the plaintiff proved that defendant had shipped his property out of the state, he was entitled to a verdict sustaining the attachment issue. This is not true. The plaintiff must sustain his alleged ground of attachment, and it did not help him to prove other grounds for attachment not alleged in the affidavit for attachment. The plaintiff wholly failed to prove the ground of attachment upon which he secured his writ of attachment, and defendant was entitled to a verdict on the attachment issue.

There was a conflict about the indebtedness of defendant to plaintiff.

The judgment will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

ADAIR v. BANK OF HICKORY FLAT.

[75 South. 758, Division B.]

1. BILLS AND NOTES. *Evidence. Collateral agreement.*

Where in a suit by a bank on a discounted note, the testimony showed that the note was charged back to the payee indorser, who accepted the note and thereafter was the real owner of it, testimony was admissible by the maker showing a collateral agreement with the payee which permitted cancellation of the note at its maturity, if the maker did not then care to pay for stock purchased therewith.

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2. BILLS AND NOTES. *Action by holder. Question for jury. Sufficiency of evidence.*

Where in a suit by a bank on a discounted note which had been charged back to the payee endorser, there was evidence of a collateral agreement between the payee and maker, which allowed the cancellation of the note at its maturity, if the maker did not desire to carry out a purchase of bonds for which the note was given, a peremptory instruction for plaintiff was erroneous.

3. BILLS AND NOTES. *Transfer. Consideration. Preexisting debt of indorser.*

In such a suit it was competent to plead and to show by proof also that a material portion of the proceeds of the note were applied by the bank to ward liquidating a preexisting indebtedness.

4. BILLS AND NOTES. *Bona-fide holder. Retransfer to payee.*

The payee of a note who has discounted it with a bank, cannot after repossessing it, thereafter rely on the *bona-fides* of the bank.

APPEAL from the circuit court of Sunflower county.

HON. E. F. EVERETT, Judge.

Suit by the Bank of Hickory Flat against W. T. Adair. From a judgment for plaintiff, defendant appeals.

The facts are fully state in the opinion of the court.

Herring & Wiley and *J. L. Williams,* for appellant.

In addition to the brief filed herein by our associate, we desire to urge upon the court that the case should be reversed because of two palpable errors on the part of the court, to wit: First, In sustaining plaintffs demurrer to special plea No. 3; Second, In giving the peremptory instruction to find for plaintiff.

Special plea No. 3 sets up a perfect defense. It is the law that one who takes a note merely as collateral security for a pre-existing debt is not an innocent purchaser for value. In the case of *Bank of Meridian* v. *Strauss,* 66 Miss. 479, this court said: "In this state it is well settled that receiving property merely as security for a pre-existing debt does not constitute the holder a purchaser for value. *Pack* v. *Harney,* 4 S. & M.

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255; *Pope* v. *Pope,* 40 Miss. 517; *Perkins* v. *Swank,* 43 Miss. 349; *Hinds* v. *Pugh,* 48 Miss. 268; *Brooks* v. *Whitson,* 7 S. & M. 513."

This seems to be the holding of the court of last resort in the states of Alabama, Iowa, Kentucky, Maine, Missouri, New Hampshire, New York, Ohio, Pennsylvania and Tennessee. See 3 Ruling Case Law, page 1059, and cases there cited. The *Strauss case, supra,* was decided in 1889, and is still the law of Mississippi, the doctrines therein announced having been re-announced in 1914 in the case of *Merchants & Farmers Bank* v. *Bank of Winona,* 64 So. 210. In that case this court said:

"When circumstances in evidence show that the payee, from whom the holder claims, came into possession of the note by fraud upon the maker, then the holder must show his good faith."

There can be no doubt that the execution of the note sued on in this case was fraudulently procured. It is shown unquestionably that the officer of the mining company who took the note, gave appellant a solemn promise in writing to the effect that if at the maturity of the note he did not care to pay for same, for any reason, the note will be cancelled and returned to him.

The court said, in the case last cited: "We think the evidence offered by appellant might be so construed as to raise an inference that Blackston delivered these notes to the bank of Winona as a security for pre-existing indebtedness."

In the case at bar the defendant did not rely on inference, but it is proven as an absolute and uncontradicted fact that when the bank of Hickory Flat took the note sued on it was put up as collateral security for a pre-existing debt of six thousand dollars.

The court below seemed to be under the impression that because it could not be shown that the Bank of Hickory Flat took the note with knowledge of the maker's defenses, then Baird and Warmack could rely on the good

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faith of the bank, but, under the testimony of Marion Allen, the Treasurer of the Memphis Mining & Manufacturing Company, Transcript page 66, which testimony is not contradicted, it would have been impossible for Baird and Warmack to have acquired the note from the Bank of Hickory Flat, because his testimony shows that the said note was turned back to the said Memphis Mining & Manufacturing Company by the Bank of Hickory Flat after this suit was filed.

Having come back into the hands of the payee the *bona fides* of the Bank of Hickory Flat has nothing to do with the case. *Andrews* v. *Robinson,* 101 Wisconsin 334, 87 N. W. 190, 87 A. S. R. 87.

"The general rule that if a person, with knowledge of facts, which will defeat a promissory note in the hands of the payee, purchases it from a *bona-fide* holder thereof, he may recover thereon upon the strength of such *bona fides*, does not apply to a purchaser who is the payee of the note. If he sells such paper to an innocent third person, and repurchases it for value, he does not thereby become possessed of any better right as against the maker than he is possessed in the first instance. Otherwise a person might become possessed of the promissory note of another by the grossest of fraud and by selling it to an innocent third person for value and subsequently repurchasing it, enforce the same against the maker. The law contains no such open door as that for the successful perpetration of fraud." 3 Ruling Case Law, page 1037, and cases there cited.

H. C. Mounger, for appellant.

The rule is uncontroverted that the payee of a note which has been procured by fraud or to which there in a defense as between the original parties, either based upon fraud or illegality of consideration, cannot after transfer of the note to an innocent purchaser, for value,

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repurchase the note and enforce it, against the maker, stripped of the defenses originally existing as between the maker and the payee. It is held that the defense of the maker cannot be cut off by passing the note through the hands of an innocent third person, although in a suit by the latter, upon the note the defense would not be available. 3 Am. and Eng. Ann. Cases, p. 626, note. We call the courts attention to the principal case of *Aragon Coffee Co.* v. *Rogers,* 8 Miss. 823, where the principal is laid down and the court said the case should have gone to the jury. See this note in full, with authorities. See note to 54 L. R. A., p. 673, where it is said: "The exception mentioned is that if the note was invalid as between the maker and payee, the payee could not himself, by purchase from a *bona-fide* holder, become a successor to his rights, it not being essential to such *bona-fide* holders protection to extend the principal so far. "See also the principal case, *Andrews* v. *Robertson, ibid;* 4 Am. and Eng. Ency. of Law (2 Ed.), 309, 87 Am. St. Rep. 870.

The fourth assignment of error is, "because the court erred in sustaining the objection to the questions of the defendant. At that time, at the time this note was taken, by the Bank of Hickory Flat, was the Memphis Mining and Manufacturing Company indebted to the Bank of Hickory Flat, and if so to what extent? and of what did said indebtedness consist?

This was in the deposition of Marion Allen, the treasurer of said company, the one who sold the stock to Adair, and who negotiated his note to the Bank of Hickory Flat. He was also secretary of the Mining Company. The objection was that the books were the best evidence. There was nothing in the objection. It was as to the existence of a fact, and if the witness knew it, he did not have to have the books before him, or introduce the books. He of all men should have known and it appears that he did know. It was important as to the transfer of the note. If the note was taken as collateral

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security for a preexistent debt, the bank was not an innocent purchaser.

Receiving property merely as security for a pre-existing debt does not constitute the holder a purchaser for value and by reason of our non-commercial statute, value applies to bills of exchange and notes taken as security for a debt." *Merchants and Farmers Bank* v. *Bank of Winona,* 64 So. 210, 212, at bottom, Opinion by COOK, J.; *First Nat. Bank* v. *Strauss,* 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579; *Allen* v. *Bratton,* 47 Miss. 119; B. & A. Dig., p. 94.

The sixth assignment and the most important and the one which covers a multitude of sins, is "Because the court erred in ruling out all the evidence of the defendant, and in giving a peremptory instruction to the jury to find for the plaintiff."

The case should have gone to the jury. The evidence clearly shows that the whole thing was a fraud. The very fact that the treasurer in taking the note, gave Adair an agreement giving him the option to decline to pay it, shows that it was a fraudulent transaction. He was right then and there laying a trap for Adair. His idea was to induce him to sign the note by this trick, and then put it into the hands of an innocent purchaser and collect. The treasurer never intended to keep this agreement from the first. The evidence also shows that Adair gave the sixty days' notice; that he never got any stock or bonds or anything else for the note. There was evidence to go to the jury to show that the bank had had notice. *Merchants and Farmers Bank of Winona,* 64 So. 211-21; *McCarty* v. *Kapreta,* Ann. Cases, 1915A., 834; *Morris* v. *Ga. Loan Savings and Banking Company,* 54 L. R. A. 507.

"Notice to an officer or agent of a corporation is, generally speaking, notice to the corporation. This is in accordance with the general doctrine of the law of agency, the rules applicable to the case of individuals and to that of corporations being the same. Am. & Eng. Ency. of Law.

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There was evidence enough to go to the jury on the question of notice. 3 Ruling Case Law, Bills and Notes, sec. 244; *Canajoharie Nat. Bank* v. *Diefendors,* 10 L. R. A. 676. It is the same with any other defense, illegality of consideration or want of consideration.

"*Prima facie* the holder is an innocent purchaser for value, but when the circumstances in evidence show that the payee from whom the holder claims, came into possession of the note by fraud upon the maker, then the holder must show his good faith. *Merchants and Farmers Bank* v. *Bank of Winona,* 64 So. 212. The case of *Emanual* v. *White,* 34 Miss. 56, 63, recognizes the doctrine that when the defendant has shown the want, or failure or illegality of consideration, or that it was lost or stolen from the rightful owner, or that the holder came to the possession of it fraudulently, that the burden of proof then shifts to the plaintiff. 4 Am. & Eng. Ency. of Law, 321." A peremptory instruction is proper only where all the facts in evidence taken as true, with every just inference from them, fail to maintain the issue. 4 B. & M. Dig. p. 32; *Whitney* v. *Cook,* 53 Miss. 551; *Farmer* v. *Cumberland Tel. Co.,* 86 Miss. 55, 38 So. 775.

"Peremptory instruction will be error unless the evidence, conceding it to be absolutely true, discloses no legal right in the party against whom it is given." *Fore* v. *Alabama & C. Ry.,* 87 Miss. 211, 39 So. 493, 690, same Dig. and page. Indeed the rule is so well settled that citations of authority are needless.

It follows then that the verdict of the jury was contrary to the law and the evidence, and that the court erred in overruling the motion for a new trial.

Barbour & Henry, for appellant.

The position of astute counsel for appellee, that the burden of proof to show that the bank was not a holder for value, and was not a holder in good faith, was assumed by the appellant, is nothing short of preposterous.

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The record did not even tend to show affirmatively that the bank did not have notice of the agreement or the defense set up. It is, therefore, perfectly apparent that the court held the burden of negativing good faith and value paid was on the defendant; and this was error, because: "In these cases, it has been uniformly held that proof of the fraud of the payee of the note, imposes upon the party claiming under him, the duty of showing that he is a purchaser for value and in good faith." *Bank* v. *Bank,* 106 Miss. 487; *Kendrick* v. *Kyle,* 78 Miss. 278; *Levens* v. *Smith,* 102 Ga. 480.

That the bank did not surrender the note is of no moment, as counsel seem to think. It even took a subsequent pledge of it. The counsel say that, "thereafter, the Mining Company was largely indebted to the Bank of Hickory Flat, which indebtedness included three thousand dollars realized on defendants note;" but there is no evidence to this effect. The evidence shows, on the contrary, that at least one thousand dollars of the proceeds of the note was applied to indebtedness incurred before the note was charged, and we submit this is shown affirmatively against a credit balance of the Mining Company with the Bank. The counsel say, too, that when the note was pledged, it "was already held by the Bank." "Already held," how? The evidence discloses, we submit, as the property of the mining company, and not as a pledgee of it. 30 Cyc., 1190, under the title "payment."

Third. The next proposition we insist upon is that, the Bank of Hickory Flat is a holder for value, only to the extent of two thousand dollars and the usees, having obtained the transfer of the note after its maturity, are limited exactly to the right of that bank. This position grants that the bank had no notice of the agreement with appellant, and that whether the usees had such notice is wholly immaterial, and that their interest in the mining company is immaterial. *Bank* v. *Mfg. Co.,* 2 C. C. A. 637; *Richards* v. *Monroe,* 85 Ia. 359; *Voss* v. *Chamberlain,* 139

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Ia. 569; *Allaire* v. *Hartshorne,* 21 N. J. L. 665; *Holcomb* v. *Wycoff,* 35 N. J. L. 35; *Stalker* v. *McDonald,* 6 Hill (N. Y.) 93; *Kitchen* v. *Londenback,* 48 Ohio St. 177; *Oppenheimer* v. *Bank,* 97 Tenn. 19; *Goff* v. *Miller,* 41 W. Va. 683; *Petty* v. *Hammun,* 2 Humph. 102.

Another view of this transaction and that one taken by counsel for appellee, necessitates a reversal, or a *remittitur* of all over two thousand dollars and interest. The counsel very correctly claim by their brief that, coupled with the conditional purchase of this stock, there was an agreement that the paper should be used by the mining company and that this feature made it accommodation paper. Granted, the amount of recovery on accomodation paper is the amount for which the holder can claim as a purchaser for value, and especially in the case of a pledgee. *Cook* v. *Clark,* 4 E. D. Smith (N. Y.) 213; *Holeman* v. *Hobson,* 8 Humph. (Tenn.) 127; *Holcomb* v. *Wycroff,* 35 N. J. L. 35; *Nickerson* v. *Reeger,* 76 N. Y. 284; *Beckhans* v. *Bank,* 12 Atl. (Pa.) 72; *Huff* v. *Wagner,* 63 Barb. (N. Y.) 215.

Indeed, it is well settled that the pledgee of accomodation paper can, in no case, recover more than the debt for which he holds the same as collateral. *Jones* v. *Hibbert,* 3 Eng. Com. Law, 419; *Hatcher* v. *Bank,* 79 Ga. 547; *Bank* v. *Werst,* 52 Ia. 684; *Matthews* v. *Rutherford,* 7 La. Ann. 225; *Bank* v. *Payne,* 18 La. Ann. 222; *Stoddard* v. *Kimbell,* 6 Cush. (Mass.) 469; *Bank* v. *Chopin,* 8 Met. (Mass.) 40; *Fisher* v. *Fisher,* 98 Mass. 303; *Allaire* v. *Hartshorne,* 21 N. J. L. 665; *Duncan* v. *Gilbert,* 29 N. J. L. 521; *Williams* v. *Smith,* 2 Hill (N. Y.) 301; *Bank* v. *Butterworth,* 45 Barb. 475; *Brown* v. *Mott,* 7 Johns. 361; *Handy* v. *Sibley,* 46 O. State 9; *Bank* v. *Doyle,* 9 R. I. 76; *Cromwell* v. *County,* 96 U. S. 60; *Valette* v. *Mason,* 1 Ind. 288; *Loy* v. *Wisman,* 36 Ia. 305; *Bange* v. *Flint,* 25 Wis. 544.

Still another view based upon this correct notion of counsel that this is accommodation paper; it is absolutely settled, contrary to the English rule and called the United

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States rule that the holder of such paper acquiring it after maturity, either as a purchaser straight out or as a pledgee, cannot recover one cent on it; this note was pledged after its maturity; the usees step into the shoes of the Bank of Hickory Flat; it matters not whether the pledge was made for a pre-existing indebtedness, in whole or in part, or for a wholly then present consideration, the maker cannot be made to pay. *Glass* v. *Smith,* 25 Ala. 474; *Battle* v. *Weems,* 44 Ala. 105; *Whitwell* v. *Crehore,* 8 La. 540; *Kellogg* v. *Barton,* 12 Allan (Mass.) 527; *Chester* v. *Dow,* 41 N Y. 279; *Grant* v. *Ellicott,* 7 Wend. 227; *Corbitt* v. *Miller,* 43 Barb. 305; *Bower* v. *Hastings,* 36 Pa. St. 285; *Hoffman* v. *Foster,* 43 Pa. St. 137; *Long* v. *Rhawn,* 75 Pa. St. 128; *Bacon* v. *Harris,* 15 R. I. 599; *Cottrell* v. *Watkins,* 89 Va. 801.

For the purpose of this argument we will treat this as accommodation paper, as in fact it was, and as conceded by opposing counsel. What is the legal *status* of such paper? It is uniformly held that as between the accommodation party (Adair here) and the party accommodated (The Mining Co.), the former (Adair) is in effect a surety. It follows from this, and is expressly so held by the authorities, that such paper is revocable by the accommodation party until it has actually passed out of the hand of the party accommodated, and into the hands of a third party for value. Therefore so long as the note was in the hands of the mining company, it was revocable by Adair, and imposed no liability or obligation upon him. It was no more than a piece of blank paper. 7 Cyc. 725 and 726; *St. Paul Bank* v. *Howe* (Minn.), 12 Am. St. 744; *Macey* v. *Kendal,* 33 Mo. 164; *Skilding* v. *Warren* (N. Y.), 15 Johns. 270; *Berkley* v. *Tinsley* (Va.), 14 S. E. 842; *Gillespie* v. *Oil Mill,* 76 Miss. 406; *Moore & Tobb* v. *Bank,* 101 Miss. 868.

We therefore respectfully submit that the note here sued on when the plaintiff bank acquired rights under it was no longer a negotiable instrument, and under the

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facts as shown, the jury should have been permitted to say whether there was fraud in its procurement. Instead a peremptory instruction was given for the plaintiff bank.

We go further and say that, had there been no question of accommodation paper, the parties had by the special indorsement, and method of transfer changed entirely the character of paper from a negotiable to a nonnegotiable one. Under the authority of Mr. Daniel's text, having changed its character, they are bound by the effect following such change. The facts of the fraudulent scheme here practiced and that shown in the Moore & Tabb case are singularly alike. Fortunately for Adair, as Judge COOK said of Moore & Tabb, the parties changed the character of the instrument sued on and Justice will yet be done.

C. C. Moodey, for appellee.

The only error assigned that is worthy of consideration is the action of the court below in giving the peremptory instruction for the plaintiff.

It is not claimed, nor is there a scintilla of evidence tending to show that the Bank of Hickory Flat had any notice whatever of the defense relied on. An effort is made, or rather it is argued that, on the facts that plaintiff is charged with constructive notice of the defense set up.

The next contention as to notice, is that at the time Baird and the Warmacks purchased the notes sued on from the Bank of Hickory Flat, they were stockholders and officers of the mining company itself which had purchased such note from the bank of Hickory Flat. This is certainly absurd, when it is considered that in this transaction neither Baird nor the Warmacks acted for the mining company in any manner whatever, but, to the contrary, acted for themselves.

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It is claimed, though it is not true—that at the time they purchased this note from the bank they had notice of Adairs defense but, even if this had been true, they would have had the right to avail themselves of all the rights which the Bank of Hickory Flat could have asserted as against Adair. 7 Cyc., page 938.

It is next contended that the Bank of Hickory Flat acquired the note sued on as collateral security for a pre-existing indebtedness due to it by the Memphis Mining & Manufacturing Company, the payee named in said note. This is note true. To the contrary, the evidence clearly establishes that the Bank of Hickory Flat accepted the note sued on, not to secure a pre-existing indebtedness due it by the Memphis Mining & Manufacturing Company, but to secure the sum of two thousand dollars, which was advanced the mining company at the time the note sued on was accepted, and one thousand dollars placed to the credit of said company, in payment of an overdraft to that extent, at that time due.

"Where a note is taken as collateral security for a debt at that time created and on the faith thereof, there is little or no dissent from the proposition that the consideration is sufficient and the indorsee a purchaser for value, and in due course of business. 7 Cyc., pages 929, 930, and cases cited.

Therefore, I contend that even if it be true, as a general proposition it no doubt is, that where one holds a note to secure a pre-existing indebtedness, such holder is not a purchaser for value, yet that principle of law has no application to the facts of this case, for the reason that the evidence clearly shows that the bank acquired title to the note to secure an indebtedness created at the time.

Both Adair and the bank state that the note sued on was executed for the purpose of enabling the mining company, the payee, to use it as collateral security (as stated by Adair), or for the purpose of getting money on it, or using it in any manner whatever, as stated by Allen.

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Therefore, the most that can be said for this note is that it is accommodation paper, executed by the appellant for the express purpose of enabling the mining company to use it as collateral security.

"In the greater number of jurisdictions a party who received a promissory note merely as collateral security for a preexisting debt, is held to take the same in the usual course of business, and is considered a holder for value. In a considerable number of other jurisdictions, however, the courts have taken the opposite view and have held such a taking to be neither in due course nor for value. 7 Cyc., pages 932, 936, and numerous cases cited.

The idea that the appellant was induced to execute the note sued on through the fraud of the Memphis Mining & Manufacturing Company, or any of its agents, is wholly unsupported by the testimony. In fact the testimony clearly shows that he knew exactly what he was doing when he executed this note. He had already purchased two of the bonds of one hundred dollars each, and capital stock to the amount of two hundred dollars for which he had paid in cash two thousand dollars. Then, as he stated, to get an option on three thousand dollars of the bonds, and three thousand seven hundred and fifty dollars of the capital stock, he executed the note sued on, knowing, according to his testimony, that it would be used as collateral security, and, according to Allen's testimony for the purpose of getting money on it, or in any other way that said company saw fit. The note was used by the mining company to get money, the money being obtained from the Bank of Hickory Flat, and now the appellant wants to avoid the payment of the note by taking the position that it was executed for the purpose of securing a preexisting indebtedness due by the mining company, to the bank. Such a defense is not made out by the evidence, and I submit, it would be a rank injustice for judgment to be entered in

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favor of the appellant under the circumstances disclosed by the evidence in this case.

Therefore, I submit, that the judgment from which this appeal is prosecuted should be affirmed.

STEVENS, J., delivered the opinion of the court.

This action was instituted by the appellee, Bank of Hickory Flat, against the appellant to recover upon a note for three thouasnd dollars executed by W. T. Adair in favor of the Memphis Mining & Manufacturing Company, or bearer. It appears that the note was given as the consideration for the purchase of three thousand dollars of the bonds and three thousand seven hundred and fifty dollars of the capital stock of the Memphis Mining & Manufacturing Company. The sale to Adair was negotiated by Marion Allen, treasurer of the mining company, and at the time the note was executed, and as a part of the same transaction, the following written agreement in the form of a letter was addressed to and delivered to the appellants:

"Doddsville, Miss., Dec. 13, 1913. Mr. W. T. Adair, City—Dear Sir: We accept your ninety day three thousand dollar note in payment of capital stock of this company, with the agreement that if at the maturity of the said note you do not care to pay for same, for any reason, we will cancel same and return to you. Yours truly, Memphis Mining & Mfg. Co., by Marion Allen, Treas. Witness: W. H. Airington."

In pursuance of the so-called option evidenced by this letter, Mr. Adair advised the Memphis Mining & Manufacturing Company at the maturity of the note that he did not care to pay the note and accept the bonds and stock. It appears, however, that the payee of the note transferred and assigned the same to the Bank of Hickory Flat, which filed suit upon the note. To the declaration the defendant filed seventeen special pleas, eleven

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of which seem to have been successfully demurred to, and the case proceeded to trial on the declaration and five special pleas. On the trial of the case the plaintiff introduced the promissory note, and when it did so counsel for the defendant claimed the right to open and close the case. Thereupon the defendant introduced testimony in reference to the execution and delivery of the note, the understanding between the maker and the payee, and in reference to who was the real owner of the note at the time the suit was tried in the circuit court. The defendant introduced the deposition of Marion Allen as a witness for the defense, and Mr. Adair testified in his own behalf. When the defendant, who had been granted the right to open and close, rested, the plaintiff thereupon moved to exclude the defendant's testimony and to grant plaintiff a peremptory instruction. The motion was sustained, and this action of the court is assigned for error. Complaint is also made at the action of the court in sustaining certain demurrers to special pleas. There is a wealth of pleading. We refrain from setting out herein the many special pleas, some of which were held insufficient on demurrer. These pleas, among other things, charge fraud in the procurement of the note, charge that the bonds and stock of the Memphis Mining & Manufacturing Company were practically worthless, charge that the Bank of Hickory Flat was not a *bona-fide* purchaser for value of the note, but that the note was assigned to the bank for the purpose of cutting off the defenses and equities of the maker, and special plea No. 1 especially relied on the written agreement, by the terms of which Mr. Adair was privileged to decline the stock and have his note canceled. Marion Allen, the "promoter" who made the contract with Mr. Adair, testified that he was secretary and treasurer of the Memphis Mining & Manufacturing Company; that he represented his company in the negotiations with Mr. Adair, admitted the execution of the collateral agreement herein above copied, stated that the

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note "was given primarily by Adair, who was already a bondholder and stockholder of said company to tide said company over a period of financial stringency;" that "soon after the maturity of the note, when payment of same was refused by Adair, the Bank of Hickory Flat was credited on the books of the mining company with three thousand dollars, the amount of the Adair note, to offset a corresponding debit of the Bank of Hickory Flat;" that when Adair refused to pay the note there was a new agreement between the Memphis Mining & Manufacturing Company and the bank whereby the mining company "executed a note in favor of the bank, for six thousand odd dollars, covering its entire indebtedness at that time, and collateraled the said six thousand odd dollar note by certain bonds of the company, and also by certain other notes made payable to the company, including the W. T. Adair note for three thousand dollars;" that at the time the note was first assigned to the bank the mining company "was indebted to the Bank of Hickory Flat in the sum of several thousand dollars evidenced by overdraft;" that witness sent the note to the bank "after a telephone conversation" between the cashier and the witness in which it was agreed that the bank was to use its best efforts in discounting the note and passing the proceeds to the credit of the Memphis Mining & Manufacturing Company, "it being understood at the time that the Memphis Mining & Manufacturing Company would be allowed to check only two thousand dollars of such proceeds, the balance to be applied as a credit against the then existing indebtedness of the mining company to the bank." When Mr. Adair attempted to testify in his own behalf, there was objection to any statements as to what transpired between him and Mr. Allen in reference to the execution of the note "until they first show that the Bank of Hickory Flat was not a *bona-fide* purchaser for value," and the court on this objection excluded some of the testimony of the defendant, and excluded, among other

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things, any consideration of the written agreement relied on. The objections interposed by counsel for the plaintiff appear to have been based upon the assumption that the burden of proof rested all the while upon the defendant to negative the *bona fides* of the bank and to show affirmatively that the bank did not part with valuable consideration. The record further shows that pending the litigation Messrs. Baird & Warmack were substituted as plaintiffs in the case, and the suit proceeded for their use and benefit. Mr. Allen in his testimony states that Baird & Warmack "are large stockholders and bondholders" in the Memphis Mining & Manufacturing Company, and that both have been at different times directors and officers.

The learned circuit court was in error in excluding the defendant's testimony and in granting the peremptory instruction in favor of the plaintiff. The declaration charges that the plaintiff bank "is the holder, owner, and assignee by indorsement in writing of said note for valuable consideration before maturity, and without notice of any defect, offsets, or defenses." The testimony shows that the bank was really satisfied, and the note was charged back to the Memphis Mining & Manufacturing Company. The latter company accepted the six thousand dollar note with bonds and other collateral attached, and embraced in this note was the amount advanced by the bank in first discounting the note sued on. There was, according to the proof, a novation as to this indebtedness, and thereafter the Memphis Mining & Manufacturing Company was the real owner of the Adair note. It is true that, according to the testimony, the Adair note was attached to the six thousand dollar note as collateral security, but the plaintiff does not here sue as pledgee of a collateral note, but relies upon the prior discount of the note. It is unnecessary to speculate upon the rights of the bank as a pledgee of a collateral note deposited after its maturity and after Mr. Adair had given notice of his refusal to pay the same. Under the state of this record the defendant had the right

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to rely upon the written collateral agreement and any other legitimate defenses. It is true there is practically nothing, in the testimony to show that the Memphis Mining & Manufacturing Company was insolvent or that its bonds and stock were worthless. As against the payee, however, the defendant had a right to rely upon his contract.

It was competent to plead and to show by the proof also that a material portion of the proceeds of the note were applied by the Bank of Hickory Flat toward liquidating a pre-existing indebtedness. *Merchants' and Farmers' Bank* v. *Bank of Winona,* 106 Miss. 471, 64 So. 210. There is no proof whatever that the bank was in fact an innocent purchaser for value, and there is no proof just how Baird & Warmack came to be the owners of the note sued on. There was an effort in this case to show that Baird & Warmack had purchased the property and effects of the Memphis Mining & Manufacturing Company after the maturity of the note and after the note had been charged back to the mining company.

It was certainly not competent for the Memphis Mining & Manufacturing Company, payee, to repossess the note from the bank, and thereafter to rely upon the *bona fides* of the Bank of Hickory Flat. Inasmuch as the cause must be reversed, and remanded for a new trial, it will profit little to discuss separately the various special pleas or the propriety of the several demurrers thereto.

Reversed and remanded.

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BOROWITZ v. STATE.

[75 South. 761, In Banc.]

JURY. *Exclusion from jury of conscientious objectors to capital punishment. Statutes.*

In a prosecution for murder it is proper for the court to exclude from the jury persons who state that they have conscientious scruples against the infliction of capital punishment, since sections 1229 and 1512, Code 1906, providing the method of fixing the punishment in such cases, do not deal with and have no bearing on the qualifications of jurors.

APPEAL from the circuit court of Washington county.

HON. F. E. EVERETT, Judge.

Blackie Borowitz alias Ed. Cameron, was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Clayton D. Potter and *A. A. Chaney,* for appellant.

Frank Roberson, Assistant Attorney-General, for the State.

SMITH, C. J., delivered the opinion of the court.

The court below committed no error in excluding from the jury certain persons who stated they had conscientious scruples against the infliction of capital punishment. *Russell* v. *State,* 53 Miss. 367; *Fortenberry* v. *State,* 55 Miss. 403; *Smith* v. *State,* 58 Miss. 867; *Spain* v. *State,* 59 Miss. 19; and *Cooper* v. *State,* 59 Miss. 264. These cases were decided under sections 2877 and 3083 of the Code of 1880, which are as follows:

"2877. Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict."

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"3083. In any case in which the penalty prescribed by law, upon the conviction of the accused, is death, the jury finding a verdict of guilty, may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death."

The only change in this connection made in either of these statutes as they now appear as sections 1229 and 1512, Code 1906, are, that at the end of the first is added the following:

"Or unless the jury shall certify its disagreement as to the punishment as provided by section 1512, in which case the court shall fix the punishment at imprisonment for life."

And at the end of the second, the following:

"Unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life."

These amendments do not deal with and have no bearing on the qualifications of jurors, but, as is well known, were adopted to prevent the mistrials that not infrequently resulted in cases wherein the jurors agreed on the guilt of the accused, but were unable to return a verdict because they disagreed on the punishment to be inflicted, and some of them were unwilling to certify such disagreement to the court, for the reason that a verdict so returned would be followed by the death penalty. In the language of CAMPBELL, J., in *Spain* v. *State, supra:*

"The law permits either of two verdicts, viz., a verdict of guilty, to be followed by a sentence of death, and a verdict of guilty, with imprisonment in the penitentiary for life. If the state must accept jurors whose scruples of conscience as to capital punishment will preclude them from consenting to a verdict of guilty to be followed by

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the death penalty, it thereby abandons in advance one of the two verdicts allowable in such cases.

"It is not correct to say that the state is indifferent as to which of the two verdicts may be given. It has denounced the penalty of death against murder; it permits the jury to say that another penalty shall be substituted for that prescribed by law as the appropriate one. To give the accused the right to have jurors who will not consent to the penalty of death is to preclude the punishment the law has affixed, and to make the law itself an instrument to defeat its own execution."

There is no merit in any of the assignments of error.

Affirmed, and Friday, the 10th day of August next, fixed as the day for the execution of sentence.

Affirmed.

ETHRIDGE, J. (specially concurring). Inasmuch as the majority opinion does not state the facts, I deem it proper to make a brief statement of facts in order that my views may be understood.

Blackie Borowitz, alias Ed Cameron, and two others, were indicted in the circuit court of Warren county at the December term, 1916, for the murder of Chas. H. Stites, and Borowitz was placed upon trial at the same term of the court, convicted as charged in the indictment, and sentenced to suffer death, and prosecutes this appeal. The killing occurred on the night of November 3, 1916, on an alleyway back of the Valley Dry Goods stores. The deceased was captain of police, and the killing occurred at night, and there was only one person that claimed to have witnessed the killing. This witness, Walter Tucker, was a negro, claimed that he had a room directly across the street from where the killing occurred, and he identified Borowitz as one of the parties engaged in the shooting. The appellant was arrested on the night of the killing some three or four blocks from where the killing occurred, and was carried to the sanitorium where Captain Stites had

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been carried to see if he could identify him, but Captain Stites failed to identify him, stating that it was dark, and that he could not recognize the man. Captain Stites did not make any dying statement, and outside of the negro witness' testimony the evidence was largely circumstantial, but there was proof in addition to this direct evidence of the negro Tucker of a confession to a fellow prisoner on the part of Borowitz, and there was abundant proof to show that the appellant was one of the parties engaged in the killing. The appellant did not testify in his own behalf, and there is no testimony on the part of the defendant that suggests that he was innocent or to raise a reasonable doubt as to his guilt on the facts.

The principal assignments of error for reversal pertain to the impaneling of jurors and the exclusion of certain parties from the jury, and as to questions propounded to prospective jurors bearing on qualifications on account of conscientious scruples against capital punishment. It appears that the court excluded certain jurors who had some hesitancy about inflicting capital punishment, and also the court held certain jurors qualified who expressed they had an opinion of the guilt or innocence of the accused that would take testimony to remove, but that the jurors were fair and impartial, and would try the case according to the law and the evidence. The appellant challenged some of the jurors who had such opinion for cause, and the challenge for cause was overruled, and the appellant challenged such jurors peremptorily, and during the impaneling of the jury exhausted all of his peremptory challenges. When the final jury that tried the case was tendered to the defendant, defendant, through his attorney, announced that "the defendant is satisfied with the jury." It is argued here that having exhausted his peremptory challenges, and being forced to exercise peremptory challenge on jurors expressing opinion, the defendant is entitled to raise the question as to whether the court was correct in overruling

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challenge to such jurors for cause. It is also insisted here that the court stood aside arbitrarily all jurors who expressed any reluctance or hesitancy in inflicting capital punishment, and that the practice of the court was tantamount to making the jurors covenant that they would hang appellant in case he was found guilty. The object of the law in giving rights of challenge, both for peremptory and for cause, is to secure a fair and impartial jury; and when the jury which tried the case was tendered to the appellant and he requested no further right of challenge, either for cause or peremptory, but announced that he was satisfied with the jury, I think we must hold that the jury was fair and impartial, especially as there is nothing in the record to show that any of the jurors were not fair and impartial who actually tried the case. I do not see how any other verdict but guilty could be rendered in the case; and objections to jurors stood aside by the court or to which the appellant's challenge for cause was overruled, is not entertainable on the record in this case. Prior to the adoption of the Code of 1906 the statutes of this state inflicted the death penalty in cases of verdicts of guilty in murder cases unless the entire jury concurred in inflicting the punishment of imprisonment for life, but with the adoption of the Code of 1906, this section was changed so that now if the jury agree on guilt, but do not agree on the punishment to be inflicted, the punishment fixed by law is life imprisonment, and under this amended statute the question might be presented as to whether a juror was competent who had conscientious scruples against the infliction of capital punishment, and as to whether the court was right, or committed error, in sustaining the state's challenge for cause to all jurors who might have such conscientious scruples or who might have scruples against the infliction of the death penalty in a murder case. There are some authorities holding that under such statutes scruples against the death penalty is not a cause for challenge,

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while other authorities hold that such scruples, notwithstanding a statute like ours, is the cause of challenge. I do not think the record in this case properly presents this question for decision, and that it is unnecessary to decide it.

As the court has decided this proposition in the majority opinion, I deem it proper to say that in my view the authorities cited in the majority opinion have absolutely no bearing on the construction of the present statute. Under the former statute it required a concurring judgment and vote of all the jurors to reduce the punishment from a death sentence to one of life imprisonment, and in such case one juror unwilling to inflict death would either have to violate his conscience or withhold his verdict. Under the former statute a single juror, in case all the jury believed the defendant was guilty, could enforce the death penalty by refusing to consent to a life sentence. Under the present statute it takes the concurring judgment of twelve jurors to inflict the death penalty, and a single juror can prevent the infliction of capital punishment, but the verdict of guilty may be returned stating that the jury cannot agree on the punishment. While the amendment in the Code of 1906 does not radically change the verbiage of the statute, it does radically change the legal effect of the statute. As these sections of the Code of 1906 are not set out in the majority opinion in full. I set them out here for the purpose of comparison with the statutes under the authorities quoted in the majority opinion as follows, to wit:

"1229. The Same; The Penalty for Murder. Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1512, in which case the court shall fix the punishment at imprisonment for life."

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"1512. Sentence upon Conviction; In Capital Cases, Power of the Jury, etc.—In any case in which the penalty prescribed by law upon the conviction of the accused is death, except in cases otherwise provided, the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall sentence him accordingly, but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death, unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life."

In the case of *Spain* v. *State,* 59 Miss. 19, the court held that the question of the jury's right to inflict life imprisonment rather than the death penalty was in no sense controlled by the heinousness of the crime or of the strength of the evidence. The legal object in all of the statutes giving the jury right to inflict the punishment was not for the purpose of measuring the punishment to the facts shown in evidence, but to satisfy the juror's conscience and to make more certain the proper administration of law in punishing crime. I challenge the statement in the majority opinion:

"These amendments do not deal with, and have no bearing on, the qualification of the jurors, but, as is well know, were adopted to prevent the mistrials that not infrequently resulted in cases wherein the jurors agreed on the guilt of the accused, but were unable to return a verdict because they disagreed on the punishment to be inflicted."

Under the former law no juror who had any conscientious scruples against the infliction of the death penalty could sit on the jury at all unless he perjured himself. If he agreed to guilt and was unwilling to return a verdict he stood as a self-confessed perjurer not only before the twelve jurors, who had taken the same oath that

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he had taken, but before all men who should come to know of his refusal to abide by his oath. The real purpose of adopting the amendment, as shown in the history of the statute, was to make competent as jurors that great and growing body of men who stood for law and order and for peace and right, but who shrank from the responsibility of taking that which God only could give. These men could not serve on juries in capital cases because on their consciences they felt like they could not assume responsibility for taking from man that which could not be returned to him in the case of mistake. They number amongst the best citizenship of the state, and in some communities this conscientious sentiment was so strong and formidable as to make it difficult to enforce the law in murder cases. It is well known of all men conversant with criminal trials that in each county there are a considerable number of people who are always ready to acquit men charged with murder, unless there is a strong popular sentiment against the individuals charged, and these men generally qualify, and would qualify under any test that could be devised by the wits of man.

I have found no statute in my limited search quite as liberal as our own on this subject, but I have found authorities that hold that where the jury have a right to fix the penalty at less than life imprisonment that they are not subject to challenge for cause because of conscientious scruples. In the case of *State* v. *Garrington,* 11 S. D. 178, 76 N. W. 326, the supreme court of South Dakota construed section 6449 of the Code of that state (Comp. Laws Dak. 1887), which reads as follows:

"Every person convicted of murder shall suffer death or imprisonment at hard labor in the . . . penitentiary for life, in the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death" or life imprisonment, etc.

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The court held under this statute that to sustain a challenge for cause because of conscientious scruples was error, although section 7359 of the Code of that state provided for challenge for cause for cases where the punishment was death, if the juror entertained conscientious scruples which would preclude his finding the defendant guilty. The court of Iowa in *State* v. *Lee,* 91 Iowa, 499, 60 N. W. 119, held under a similar statute that it was error to sustain a challenge for cause. To the same effect are *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414; *People* v. *Stewart,* 7 Cal. 140; *Atkins* v. *State,* 16 Ark. 568. In our state we have no statute providing that conscientious scruples against the infliction of the death punishment is a disqualification, but the disqualification from this cause, heretofore recognized, grew out of the fact that the verdict of guilty in a murder case would be followed by death unless the whole jury fixed the punishment at less than death. It is a principle as old as English common law that where the reason of a rule ceases the rule itself ceases, and there is under the present statute no reason why a juror should not return a verdict of guilt, even though he entertains scruples against the death penalty. The state representing the whole people of Mississippi does not clamor for any man's life, but is satisfied in case of guilt with a life sentence for the prisoner. To present the question in this kind of case for decision I think where the peremptory challenges are exhausted and the defendant desires further challenge, or is not satisfied with the jury, that he should present his objections to the court, and if the court denies him further right, to take exception. There was no exception taken in the present case, and in addition the defendant announced that he was satisfied with the jury which finally tried him.

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HOLLIDAY v. MARYLAND CASUALTY CO.

[75 South. 764, Division B.]

1. LIBEL AND SLANDER. *Words libelous per se.*

Where an insurance company issued a circular letter to its agents not referring to plaintiff by name, but referring to him as follows: "Living in a southern state, a hard drinker, a habitual carrier of fire arms, reputed to be twice a man killer, minus one foot when insured, none of these facts except the lost foot given us; represented by agent as a good risk, recently shot off his other, and makes claim accordingly." This language was not libelous *per se*, where plaintiff in his declaration substantially admitted all the statements therein, except that he denied he had killed two men, and claimed he had killed only one man, since the language used does not charge him with designedly shooting off his remaining foot for the insurance, but is consistent with an accidental shooting.

2. LIBEL AND SLANDER. *Charging special damages.*

A circular letter by an insurance company addressed to its agents only and not libelous *per se* is a qualified privilege communication and a declaration thereon for libel and slander was insufficient where it does not specifically state that any particular person, other than defendant's agents, ever saw or heard of the circular and did not allege except in a general way wherein plaintiff was injured in business or reputation.

APPEAL from the circuit court of Madison county.

HON. W. H. POTTER, Judge.

Suit by T. C. Holliday against the Maryland Casualty Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

H. B. & J. W. Greaves, for appellant.

The last charge is the one charge which appellant is aggrieved at. Appellant claims that this last charge, that he shot off his other foot and made claim accordingly, in-

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dicated to any ordinary man's mind, not accustomed to splitting hairs to find excuses to let a man out of trouble, conveys the idea of moral turpitude and also a transgression of the criminal laws: First, that a man would collect seven thousand, five hundred dollars, the amount of the insurance, which he knew that he was not entitled to; second, that he would lie in order to collect this insurance and thus transgress the criminal law against perjury; third, would obtain under false proceedings the sum of money for which he was insured.

This last quoted paragraph from the objectionable letter, suggests moral turpitude and a transgression of the criminal law is liberlous *per se.* As to the construction of the paragraph note *Canduan* v. *Mille,* 98 Wis. 164.

It will not do to be too highly technical in order to arrive at a conclusion that the construction of the words used in the circular might be susceptible of two constructions and to give it the construction that he does, that it was a harmless suggestion that his leg was shot off accidently without any moral turpitude being attached to Holliday, when it is apparent to the ordinary person that the inference necessarily gathered from the language, to an unbaised mind is that it was intended to directly charge that appellant in this case deliberately shot off his leg. It won't do for the court to be highly technical and hair-splitting in undertaking to construe the language used to exonerate the appellee.

The court holds: "It is the duty of the court to see what the rest of mankind sees and to understand the meaning of the writing as the rest of mankind understands it, and to place itself in the position of any unbiased reader of ordinary intelligence and thus determine the meaning which the language, considered in its proper sense, was intended and calculated to convey. See *Hothkiss* v. *Olmsted,* 37 Ind. 74; *Tillman* v. *Robins,* 68 Me. 295, s. c. 28 Am. Rep. 50, 85 Am. Dec. 456, 18 Am. Rep. 466, 56 Miss. 808.

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Written words charging a person with a crime are libelous *per se* whether the crime be a felony or a misdemeanor. See *Ivy* v. *Pioneer Sav. etc. Co.*, 113 Ala. 349, s. c. 21 So. 531; See 47 Am. St. Rep. 737. *Palmer* v. *Concord*, 48 N. H. 211, 97 Am. Dec. 605, 47, Am. Rep. 183, 21 L. R. A. 493; 11 L. R. A. 725; 31 Am. Rep. 757; Also see Am. & Eng. Enc. of Law, 188; *McLaughlin* v. *Fisher*, 136 Ill. 111, a good case; *Parker* v. *Detroit Free Press*, 1 L. R. A. 599; *Hansen* v. *Krehbiel*, 64 L. R. A. 790, See last paragraph of opinion, page 794; See, also, 12 Am. St. Rep. 696.

Words that tend to expose the plaintiff to public hatred, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace and cause him to be lowered in the mind of right thinking people and deprived of their friendship society or respect are libelous and actionable *per se.*"

If the last paragraph quoted, "Recently shot off his other foot and makes claim accordingly" does not tend to do all of this, then what would? See the case of *Obaugh* v. *Finn*, 4 Ark. 110; s. c. 37 Am. Dec. 773; *Rice* v. *Simmons*, 31 Am. Dec. 766; *Augustus Evening News* v. *Radford*, 91 Ga. 494; *Kirkpatric* v. *Eagle Lodge*, 26 Kan. 384; 40 Am. Rep. 316; 52 Am. Rep. 768; *Smith* v. *Smith*, 3 L. R. A. 52. This is a good case. See 8 L. R. A. 214. The question of libel or no libel in civil action is one of law which the court must decide, where the publication is admitted, and the words are unambiguous and admit of but one construction, otherwise where two can be placed upon it, then it is a question for the jury. See *Moore* v. *Francis*, 8 L. R. A. 214.

The question of good faith in the publication is for the jury and not for the court. *Hinman* v. *Hare*, 104 N. Y. 641, See, also, *Morey* v. *Morning Journal Association*, 9 L. R. A. 621. It is not necessary that the charge should be made in express terms in order to be actionable *per se.* See *Rebo* v. *Fuller*, 84 Tex. 450; s. c. 31 Am. St. Rep. 75. A libel may be made in the form of insinuation, allusion,

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irony, or questions as well as in positive and direct terms. See *Wafford* v. *Meek,* 129 Ala. 349; s. c. 30 So. 625. The manifest intention of the circular issued is to charge Holliday with being a swindler and a liar. "It is libelous *per se* to charge a man with being a swindler." See *Canduan* v *Miller,* 98 Wis. 164.

The next question: No name being called, are we entitled to recovery? On this question the decided weight of authority is that the libelous language need not name the plaintiff as the person to whom it refers. It is sufficient if the fact that the plaintiff is the person intended to be libelled, can be ascertained from the words of description or other references made by the publication, or even if it can be shown by extrinsic facts and circumstances. See the case of *Lethrop* v. *Lumberg,* 55 Wash. 144. This case sustains our contention that plaintiff's name need not be mentioned in order to justify a recovery. In that case, a recovery was permitted where the plaintiff, in his declaration showed that it was intended for him and brought himself within the terms of the circular in his declaration. The same circular was also under consideration in the same court, in the case of *Dunlap* v. *Lumberg,* the same volume, 55 Wash. 609, also reported in 133 Am. St. Rep. 1050.

I have read the originals of both opinions delivered by the same court. In the first opinion, a right of recovery was conceded. In the second case, the demurrer to the declaration was sustained because the court said that by the declaration the plaintiff showed that he did not belong to the class referred to. See also the case of *Weis* v. *Hoss,* 6 Ala. 881; *Colvert* v. *Black,* 110 Ga. 642."

"It is sufficient if those who know the plaintiff can understand from the language used that he is the person referred to." *Lewis* v. *Soul,* 3 Mich. 514. See, also, the case of *Duviver* v. *French,* 105 Fed. 278. See, also, *Northrop* v. *Tibbles,* 215 Fed. 99. The last case cited a number of authorities in point here.

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It goes without saying that this paragraph is libelous *per se* and also that it is for the jury to determine whether it applies to appellant or not. The remaining question is whether the communication was a privileged communication. The declaration alleges that the letter was addressed to its agent and others.

Again, if this letter was written in malice and directed to the agents and no other persons, and was carelessly and negligently handled by the agents to such an extent that other persons were allowed to peruse this circular, it was not privileged and defendant, appellee is not protected on this point. See the following cases: *A. & V. R. R. Co.* v. *Brooks,* 69 Miss. 168 and authorities grouped in opinion at top of page 158; *Hinds* v. *Shoemaker,* 97 Miss. 669, very much in point here; See, also, 104 Am. St. Rep. 110 and cases cited. See, also, recent case of *Pate* v. *Trollinger,* 74 So. 131, Adv. Sheet, Mch. 24, 1917.

We respectfully submit, on the authorities, that this case being heard on demurrer, admits the allegations of the bill, (while of course, not admitting the law); it is up to this court to determine the allegations of the bill being true, whether or not the appellant has a right to have his case submitted to a jury, and we respectfully submit that the court had no right to take this case from the jury on the demurrer and that this case should be reversed for trial.

McLaurin & Armistead, for appellant.

We are pressed with the inquiry as to whether or not the letter was libelous *per se.* If it was libelous *per se,* of course, no special damages are required to be shown or proven. The court below even admits this much. We respectfully submit that the letter is libelous *per se* for two reasons: first, it charges the common-law offense of self-mutilation. This will be clearly shown by reference to 26 Cyc., p. 1601, under the head of "Mayhem," we find

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the following text: "The crime may be committed by a white man on the body of a slave, and the statutes are held to give the same protection to the internal organs of the female as to the external organs of the male. Under early English statutes which were directed against the maiming of others, it was held that if one maimed himself or procured himself to be maimed, both he and the party by whom the maim was effected were subject to fine and imprisonment." Citing in support of this case *Wright's Case,* Coke Litt, 127; 1 Hale, P. C. 412; 11 Jac. 1. The same doctrine is announced in 20 A. & E. E. of Law page 247, and cases cited. Second, the letter is libelous *per se* because it charges the party referred to necessarily with false pretenses. The letter on its face shows that it has reference to the fraudulent collection of indemnity for accidents, and it necessarily follows, we respectfully submit, that if a party to do this shoots off his foot and makes claim accordingly, he must be guilty of false pretenses, because such conduct would not be in keeping with an accident for which he would be entitled to be indemnified under the contract in question. *State* v. *Hubanks,* 99 Miss. 775.

As shown above, the declaration shows the letter was sent not only to agents, but to others, and even if it was a qualified privilege as between the agent and the principal, it would not be qualified if sent to others, or if carelessly permitted to be seen by others. We submit, however, that even if sent to the agent, that the publication was excessive and unnecessary. In the first place, it is definitely settled that the plaintiff need not be named in a libelous publication if by means of description or references therein, or by extrinsic facts and circumstances, sufficient information is imparted to show who was referred to, see, 25 Cyc., p. 362, and authorities cited. Furthermore, to constitute a publication it is not necessary that the facts or libelous charges should be made known to

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the public generally. It is enough if they are made known to a single person. 25 Cyc. p. 366.

In reference to sending a letter to an agent, we find in 25 Cyc., p. 369, the following text: "If a person composes a libel and send it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support an action," citing a number of cases in support of this doctrine. Want of actual intent to injure the party libeled is no excuse for the defamatory matter and is actionable *per se*. The malice will be conclusively presumed. 25 Cyc., p. 271.

In the case of *Rogers* v. *Kline*, 56 Miss. 888, it was held that the injury was the same whether the article is the result of malice or of carelessness and malice. Even if it could be shown that the libelous letter or circular was privileged and was intended only for agents, yet the declaration is sufficient and the effect would only be to put the burden of proof upon the plaintiff to offer some evidence of malice beyond the mere falsity of the charge. This was clearly settled in the case of *A. & V. Railway Co.* v. *Brooks*, 69 Miss. 168.

W. H. & R. H. Powell, for appellees.

The appellant, by his declaration has impaled himself upon the horns of a dilemma. "In order to identify himself with the subject of these characteristics, he must admit, that he answers to such characteristics, or in other words that the cap fits him, in which case the statement would be truthful and therefore not libelous. Conversely, if he does not possess those characteristics, manifestly he is not the person referred to."

The letter does not show malice "*per se*" and is a perfectly legitimate communication from the president to the agent of appellee. This learned court has lately decided that: "Where a letter between parties having business relations was not libelous *per se* and did not go beyond the

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exigencies of the occasion, the burden of proof shifted to the plaintiff acclaiming he was libelled by such letter, to prove malice in fact." *Lucas E. Moore Staves Co.* v. *Wells,* 72 So. 228.

'Tis true, that in this case the testimony was heard, but the same rule must apply in the case at bar, because, aside from the conclusions of the pleader, the declaration when construed with the whole letter made an exhibit, manifestly shows no malice in fact against appellant or any other person. It shows the exigencies of the occasion were not exceeded.

"The authorities, as a rule, define 'libel' as a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloquy, to which may be added, or which causes him to be shunned or avoided, or which has a tendency to injure him in business." Ib. 230.

In the Mississippi case of *Hines* v. *Shumaker,* 52 So. 705, the court said: "Where the communication is upon a privileged occasion and is a privileged communication, the burden is upon the plaintiff, of course, to show actual malice in order to recover, but if the privilege of the communication is not conceded, and does not appear from the plaintiff's testimony as is the case here, the burden is then upon the defendant, who relies upon the privilege, to establish it. *Abraham* v. *Baldwin,* 52 Fla. 151, 42 So. 591, 10 L. R. A. (N. S.) 1051, In Odgers on Slander and Libel, pp. 286, 287, stated as follows: *Abraham* v. *Baldwin,* 52 Fla. 156, 42 So. 592, 10 L. R. A. (N. S.) 1051.

While ordinarily, privilege is a defense to an action for libel, which must be affirmatively pleaded, yet if the complaint show on its face that the publication was privileged, the point may be raised by demurrer. *Gosewisch* v. *Doran,* 119 p. 656. 3 American Digest, Key-Number Series, p. 1348, para. 97.

Whether a libelous signification could be attributed to the words used was properly determined on demurrer

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to the complaint. *Trimble* v. *Anderson,* 79 Ala. 519; 32 Am. Dig. Century Ed. Column 2192k, par. 234, (C) Lib. & Sland. The defendant may demur to a part of the words laid in a court for slander. *Abrams* v. *Smith,* 8 Blackf. 95; Ib., Column 2192, para. 234 (e).

In an action for libel the defendant may test the actionable quality of the words by demurrer, and to that extent only is his pleading to be construed as an admission of the allegations of the complaint. *Gunning* v. *Appleton,* 58 How. Prac. 471; Ib. Column 2194, Para. 235 (j); *Wellman* v. *Sun Printing & Publishing Co.,* 66 Hun. 331, 21 N. Y. Supp. 577; 50 N. Y. State Rep. 254; *Fry* v. *Bennett,* 7 N. Y. Super. Ct. (5 Sandf.) 54; Ib. Column 2195, para. 236 (c); 6 Ency. Pl. & Practice, page 336; *Schulze* v. *Jalonick,* 18 Texas Civ. App. 296, 44 S. W. 580, 36 L. R. A. (N. S.) 450; 10 L. R. A. (N. S.) 1052, para. 2.

"In determining whether or not the communication is privileged, the nature of the subject, the right, duty or interest of the parties in such subject, the time, place, and circumstances of the occasion should be considered." *Abraham* v. *Baldwin,* 52 Fla. 156, 42 So. 592.

Now, we submit that the letter discloses the nature of the subject and the right, duty and interest of the writer as president of the company and of the addressees. It was perfectly proper for the president of the company to advise the agents of defendant about the subject in which all had a real interest, and he had a right to use an impersonal illustration of the characteristics to be avoided. His failure to name the plaintiff is conclusive evidence that he had no "malice *per se*" to plaintiff, for if he had had and desired to certainly injure him, he would have named him as the person who possessed such characteristics.

"Where words imputing misconduct to another are spoken by one having a duty to perform, and they are spoken in good faith and in the belief that the speaking is

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in the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises, and therefore, no action can be maintained on them, without proof of express malice." *Sands* v. *Robinson,* 12 S. & M. 704.

"A letter written confidentially, under the impression that its statements are well founded, if the writer was acting *bona fide,* with the view to the interest of himself or the person to whom it is written though it contains matter which would otherwise be libelous, is protected as a confidential communication, and is not libel." *Torrence* v. *Hurst,* Walker's Miss. 403. In L. R. A. 2131: *Sunderlin* v. *Bradstreet,* 46 N. Y. 191; *Harrison* v. *Bush,* 5 El. & Bl. 344; *Briggs* v. *Garrett,* 2 Cent. Rep. 364, 111 Pa. 404; Newall on Defamations; 2 Slander & Libel (2 Ed.), Pa. 388; 18 Am. & Eng. Enc. of Law (2 Ed.) 1037; *King* v. *Patterson,* 49 N. J. L. 438, 22 Atl. 193, 26 Am. St. Rep. 432, 13 L. R. A. 655; *Holmes* v. *Clisby,* 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103; *Holmes* v. *Knox,* 23 Fla. 595, 3 So. 211; *Allen* v. *Cape Fear, etc., R. Co.,* 100 N. C. 397, 6 S. E. 105; *Briggs* v. *Garrett,* 111 Pa. St. 414, 2 Atl. 513, 56 A. Rep. 274."

COOK, P. J., delivered the opinion of the court.

The appellant filed suit in the circuit court of Madison county, a demurrer to the declaration by the defendant; the demurrer was sustained; the plaintiff filed an amended declaration, and the demurrer to same was also sustained, and plaintiff appeals.

It is unnecessary to set out in this opinion the first declaration. The amended declaration, omitting the formal parts, was as follows:

"For that, whereas, the plaintiff, T. C. Holliday, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a

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person of good name and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens in the city of Canton, in the county of Madison, and in the state of Mississippi, and of other worthy citizens and business acquaintances in other parts of the state and outside of the state, yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, on the 22d day of August, 1914, and shortly subsequent thereto in a certain circular letter which the said defendant had printed and directed 'To Each Agent,' as will be shown by a copy of said letter herewith filed, marked Exhibit A and made a part of this declaration, which circular letter, although not calling the name of plaintiff, did directly, specifically, and intentially refer to plaintiff in paragraph A therein, which said paragraph is as follows:

"A. 'Living in a Southern state, a hard drinker, a habitual carrier of firearms, reputed to be twice a man-killer, minus one foot when insured, none of these facts, except the lost foot, given to us; represented by the agent as a good risk; recently shot off his other and makes claim accordingly. Our claim investigator discovered the above characteristics.'

"The defendant in writing did willfully and maliciously and wantonly, and with the malicious design to injure plaintiff in his reputation and to mortify and humiliate him in his business, circulating and publishing said circular letter with paragraph A therein, meant and intended by said paragraph A to refer to plaintiff, and had no other person in mind when it made said publication. And defendant did willfully and maliciously and with a wanton desire to humiliate, mortify, and bring plaintiff into disrepute and disgrace, charged by said circular and by said paragraph A above referred to that plaintiff (deliberately) shot off his said foot (for the purpose of collecting said insurance); and said defendant did, at the

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time aforesaid, mail, circulate, and excessively publish said circular letter containing the said false, scandalous, and malicious language, to his local agent and others, in many towns and cities in the state of Mississippi, and in other states. The recipients of many of these letters, and particularly the agents of the said defendant company in Canton, and other places, who were personally acquainted with plaintiff, and who knew that plaintiff had sometimes in the past been in the habit of drinking to excess, and knew that plaintiff had some years before been involved in a personal difficulty, which caused plaintiff great uneasiness about his personal safety, and who, in order to protect himself, sometimes went armed, and who knew that plaintiff himself was finally compelled to kill his adversary in a personal encounter, the same being the culmination of the above difficulty, and for which no indictment was ever returned against plaintiff, and which said agents and other persons who received said letter also knew plaintiff had lost one foot in said difficulty, and that plaintiff only had, when he obtained insurance from the defendants, one foot, and that plaintiff had recently lost that foot, and parties receiving said circular letter in other cities and towns in the state of Mississippi, of whom there were many, understood the said libelous matter to refer to this plaintiff. By means of the committing of the said several grievances by the defendant, and especially in charging the plaintiff with willfully and designedly shooting off his remaining foot for the purpose of procuring the insurance thereon, the plaintiff has been and is greatly injured in his good name, credit, trade, and business, and has fallen into great discredit among his neighbors, friends, and acquaintances and of whom he was accustomed to enjoy their confidence, companionship, and respect, to his great humiliation, chagrin, and mortification, and to the actual damage of plaintiff in the sum of ten thousand dollars, and plaintiff claims by way of punishment to defendants for their

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willful and wanton and libelous conduct punitive damages in the sum of ten thousand dollars, in all, actual and punitive damages, the sum of twenty thousand dollars."

The demurrer to this declaration was general and specific, raising the law points we will take up in this opinion.

The opinion of the trial judge sustaining the demurrer is in these words, viz.:

"This is an action founded upon an alleged libelous circular letter, sent out by the president of the defendant corporation, and addressed to each agent. This circular is an advisory letter, and upon its face is apparently intended to prevent the acceptance of risks, by agents, deemed undesirable by the management, and is qualifiedly privileged, if confined to, and sent out alone to defendant's agents. The declaration, however, avers that the letter was mailed out to agents and others, and was received by them, and that its publication was excessive, and so exceeds the privilege. While no name is mentioned in the letter, it is fully charged that it was written of and concerning the plaintiff, with a malicious design to injure him. The only serious question presented is whether the letter is libelous *per se*. If it is there is no necessity to show special damage resulting from the publication. But if not, it must be shown to be knowingly false, published with malicious motive, and that special damage was sustained. "The declaration under consideration does not set out special damage, within the accepted meaning of that term. It therefore appears that whether the declaration is good against demurrers depends upon whether the words alleged to be libelous are so in themselves. The words claimed to be libelous, taken from the letter that is made an exhibit to the declaration, are: 'A hard drinker, a habitual carrier of firearms, reputed to be twice a man-killer; minus one foot when insured'—and, standing alone, might of themselves be calculated to bring plaintiff into bad repute; but when

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the letter is made a part of the declaration, the whole letter should be considered, as well as the fact that plaintiff's name is not mentioned. *Rodgers* v. *Kline,* 56 Miss. 808, 31 Am. Rep. 389. The letter charges no one with a violation of any criminal law, is not abusive, charges no dishonesty or moral turpitude; and considering the letter alone, it bears no indication of malice, or that any one is intended to be held up to scorn or ridicule. In addition to this, the plaintiff, in his declaration, admits that he had in the past been in the habit of drinking to excess; that for his protection he sometimes went armed; that he had killed a man; and that he had but one foot. So that the admissions are almost as broad as the paragraph complained of as being false.

"Considering the letter as a whole, and the admissions made by the plaintiff, and the absence of a showing of special damages in the declaration, I think the demurrer should be sustained."

It is clear that the circular letter is not libelous *per se,* and is only made so by the averments of the declaration. The circular says, that example B "recently shot off his other foot and makes claim accordingly." This statement is not denied; it is not charged that it was false, but plaintiff says that the defendant willfully and designedly charged plaintiff with shooting off his remaining foot for the purpose of procuring the insurance thereon. This is an inference not warranted by the language of the circular. In fact, plaintiff admits that example B fits him exactly, and everything said is literally true, except he denies that he had killed two men, and asserts that he had killed only one man. As we construe the declaration, the plaintiff admitted that he had killed one man, that he had been guilty of the excessive use of ardent spirits, and that he had (accidentally) shot off his remaining foot and made claim accordingly; that he lived in a Southern state. Nothing more appears in the circular.

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It will be noted that the declaration does not specifically state that any particular person, other than defendant's agents, ever saw or heard of the circular; it is not alleged, except in a general way, wherein and with whom he was injured in his business or reputation. The circular was a qualified privileged communication, not libelous *per se,* and to render same libelous the pleadings must specifically set out the facts which will be proven to establish the libelous character of the writing; mere generalizing is not sufficient. Before he could recover he had to prove wherein and with whom his business or reputation suffered, and, this being true, it is necessary that he plead it. *Johnson* v. *Robertson,* 8 Port. (Ala..) 486.

In this case plaintiff could only recover special damages, and he cannot recover special damages without naming in his pleadings the persons who read the circular and with whom he suffered in his business or reputation. It is necessary to point out with reasonable precision his special damages. *Linden* v. *Graham,* 1 Duer (N. Y.) 672; *Kendall* v. Stone, 5 N. Y. 14. "In an action for slander or libel, no evidence of special damages can be given unless the same is alleged in the declaration." Ency. Pleading & Practice, vol. 1, p. 771.

As we construe the case made by the declaration, it appears that the alleged libelous publication was a privileged communication; that it was not libelous *per se.* The plaintiff did not allege special damages, and it therefore follows that the demurrer to the declaration was properly sustained.

Affirmed and dismissed.

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SPENCER v. SPENCER.

[75 South. 770, Division B.]

1. REFORMATION OF INSTRUMENTS. *Voluntary conveyances.*

The general rule that voluntary conveyances being without consideration gives the grantee no right to reform without the consent of all parties, applies only in cases between the donor and donee.

2. SAME.

This rule does not apply to conveyances in execution of a family settlement.

3. SAME.

Complainant, a voluntary grantee of his deceased mother, had the right to have the deed reformed as against his brother, also a voluntary grantee from his mother, where it clearly appears that through mistake the deed failed to carry out the intention of the donor.

APPEAL from the chancery court of Washington county.

HON. E. N. THOMAS, Chancellor.

Bill by T. H. Spencer against S. M. Spencer. From an order overruling a demurrer to the bill of complaint, defendant appeals.

The facts are fully stated in the opinion of the court.

Campbell & Cashin, for appellant.

It plainly appearing from the original bill that appellee is a voluntary grantee, will a court of equity lend its aid in his favor to reform a conveyance, especially where his pleadings show that he does not, at this late date, know the contents of the deed, and whether he ought to have eighty-three acres or one hundred acres more land? We think not.

"In order to warrant the reformation of a deed or mortgage, it must be founded upon a consideration, or

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all of the parties must consent to the reformation. 24 Am. & Eng. Ency. of Law, 653; *German Mutual Ins. Co.* v. *Grim,* 2 Am. Rep. 34; *Willey* v. *Hodge,* 76 Am. St. Rep. 852.

In *Dawson* v. *Dawson,* 18 Am. Dec. 513, it is said: "The old beaten ground long since occupied by the courts of equity not to aid voluntary conveyances seems to render any reason that might be urged to show that the bill should be dismissed both trite and unnecessary." See note to *Williams* v. *Hamilton,* 65 Am. St. Rep. 475; *Jones* v. *Jones,* 88 Miss. 784; *Willey* v. *Hodge, supra; Enos* v. *Stewart,* 70 Pac. 1105; *Henry* v. *Henry,* 74 N. E. 126, and 17 Dec. Dig. Title, "Reformation of Instruments, section 8.

In 14 Am. and Eng. Ency. of Law, page 1046, the rule is thus stated in regard to the reformation of a deed of gift: "A court of equity will not lend its aid to reform a deed of gift at the instance of the donee."

In 34 Cyc., page 928, it is said: "In view of the fact that a voluntary conveyance is not supported by a consideration, the general rule is that an instrument representing such a conveyance cannot be reformed, unless there is, at least, a meritorious consideration, or unless all of the parties consent." On the same page it is also said: "No consideration having passed, and no right having vested, a correction of a voluntary conveyance will not be made on the application of the grantee or volunteer against the grantor or his heirs, or against his creditors. But where a grantee in a deed given for love and affection only, went into possession of land and made improvements and thereafter mortgaged the premises for a valuable consideration, a bill by the mortgagee for a correction of a mistake in the deed was maintained against the grantor and his heirs; also defects in a conveyance in a charitable use were supplied where money had been advanced and labor and material furnished on

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the strength of the promise of the donor. *Powell* v. *Powell*, 73 Am. Dec. 724.

But it is argued that the case of *Miles* v. *Miles*, 84 Miss. 624, changes this rule so far as the state of Mississippi is concerned. We think this argument is based upon a misconception of the scope and extent of the opinion of the court in that case. As stated by Judge TRULY, speaking for the court on page 639:

"This principle (that equity will not interpose to order a reformation of a deed in favor of a volunteer) has no application to the case at bar. Appellees are not volunteers. A part of the consideration from Wm. H. Miles to them was the purchase by Theus N. Miles of his brother's interest in the estate of William R. Miles for the sum of ten thousand dollars." The decision in the Miles case, as shown both by the language of the opinion, and the syllabus, is based upon the ground that appellees are not mere volunteers. Having so decided, that is as far as the facts warrant the decision in going, and the balance of the opinion of the court may be considered mere *dicta*. But, on page 640 of the report, Judge TRULY further states:

"The well-settled rule that equity will not interfere in favor of a volunteer against a grantor to correct a mistake, or reform a defective conveyance, is based upon the idea that the volunteer is but the recipient of a bounty and has no enforceable claim or demand. This is sound law, but not applicable to the case here presented. Here the grantor's interests are not involved. This is not a contest between a prior and subsequent voluntary grantee, for appellants and appellees claim for the same source, and derive title by virtue of the same transaction."

It may be argued that this is exactly the case here, but an examination of exhibit one to the bill, to wit; the deed to T. H. Spencer, shows that it was executed on January 12, 1911, and exhibit three the deed to appellant, shows

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that it was executed on January 13, 1911, and both instruments show that it was the intention of the grantor to convey to appellee such part of Otterburn Plantation as was not conveyed to appellant.

It is true that Judge TRULY says by way of *dicta* that the real intent of the grantor having been ascertained, a court of equity will decree that it be enforced, and that such cases do not fall within the rule denying the aid of equity to voluntary grantees, citing, *Adair* v. *McDonald,* 42 Ga. 506; *Huss* v. *Morris,* 63 Pa. 372, and 18 Ency. of Pl. & Pr. 787. An examination of these authorities will show that they do not bear out Judge TRULY. 18 Ency. of Pl. & Pr. 787, to which Judge TRULY refers is in reference to a controversy to which the grantor is not a party, and is as follows: "Although a volunteer is not a proper party complainant in a suit against a grantor for the reformation of a defective conveyance, the rule is otherwise where both complainant and defendant claim under the same deed and the grantor's interests are not at stake, and the claim of the plaintiff is that the grantor did not, in fact, make the instrument set up by the defendant,' citing *Adair* v. *McDonald, supra,* in which the court says: "Neither the authorities nor the principles on which this rule is founded apply to cases where the grantor is indifferent, has done nothing inconsistent with the deed proposed to be reformed, and the contest is, in fact, not between claimants under different deeds, under two independent acts of the voluntary grantor, but under the same deed."

The case at bar is not the same case to which the text from the Ency. of Pl. and Pr., page 787, applies, nor is it the same sort of case as *Adair* v. *McDonald, supra.* In the case at bar, we do not know whether the grantor is indifferent or not, because she is dead; but she has done something inconsistent with the deed proposed to be reformed. Before she executed the deed proposed to be reformed, she conveyed to appellee a part of Otterburn

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Plantation, and then, on the next day, she conveyed to appellant all that part of Otterburn Plantation which she had not already conveyed to appellee. Here the appellant and appellee both claimed under different deeds, and under two independent acts of a voluntary grantor, and not under the same deed.

The case of *Cumming* v. *Freer,* 26 Mich. 130, also referred to by Judge TRULY, while strikingly in point with the Miles case, is certainly not strikingly in point with the case at bar, except that the draftsman of the bill in this case has evidently attempted to make it somewhat similar to the case of *Cummings* v. *Freer,* by alleging that is not a fact, viz: that Mrs. Spencer was dividing her property between her four children, and, on the same day that she made a conveyance of Otterburn Plantation to her two sons, she also made a conveyance of Glen Allen Plantation to her two daughters, as the land records will show. While this is *dehors* the record, be it as it may, the court will see that in *Cumming* v. *Freer,* Judge CHRISTIANCY bases his reason for refusing to apply the general principle that equity will not assist a grantee in a voluntary deed upon the ground that the voluntary grantee in that case had, on the faith of the deed, gone into possession of the land intended to be conveyed to him, made improvements thereon, and expended money upon it. None of these things appeal in favor of the appellee in the case at bar. *Miles* v. *Miles, supra,* does not apply, because the facts are different.

We respectfully submit that the demurrer to the amended bill should have been sustained, and that a decree should be entered herein reversing the decree below, and dismissing appellee's bill.

Percy & Percy, for appellee.

This case is so clearly within the principle laid down in the case of *Miles* v. *Miles,* 84 Miss. 624, as to hardly admit of argument. It is needless to burden this court

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with any extended citation of authority, and we will confine ourselves merely to a citation of the utterance of the supreme court of this state. The case of *Miles* v. *Miles,* 84 Miss. 624, is identical with the case at bar, and we submit is decisive of the questions raised herein. Counsel seeks to differentiate the instant case from the Miles case, by stating that the instrument conveying the property to the complainant and the defendant were executed on different days, creating the inference that the instruments conveying the property in the Miles case were executed contemporaneously. The properties which were the subject of controversy in the Miles case, were not conveyed by the same instrument, nor by different instruments, executed, at the same time, as a casual perusal of the facts in that case will disclose. The court does place emphasis on the fact that the instruments were executed in pursuance of the same transaction, that is one parcel of land was conveyed by deed and one parcel devised by will in pursuance of a determination on the part of Gen. W. R. Miles to apportion his property among his heirs. The bill in the instant case sets out that the deeds mentioned therein were executed in pursuance of the determination of the mother of the parties to divide her property, though counsel argues that the court bases its decision on the fact that a consideration was paid by Theus N. Miles to his brother for his interest in the estate as the ground upon which the court holds that the instrument was not a voluntary conveyance, we submit that while the court does say that the payment by Theus N. Miles was sufficient to prevent the operation of the rule against volunteers being invoked, the ground upon which the court really based its decision, and this is the principle governing the instant case, is as follows:

"But a second and stronger reason is that the instrument by which Quofoloma and Omega Plantations were vested in appellees, and that by which Mileston and Good Hope plantations were vested in appellant Mary R. Miles,

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constitute, in fact, one and the same transaction. All parties deraign from a common source, and stand before the court in the same attitude as if they had inherited the property jointly, and then undertaken to amicably divide the same, and a mutual mistake had occured in their deeds of partition, the power of a court of equity to reform instruments and correct mistakes growing out of such transactions in proper cases is universally recognized."

The appellee and the appellant deraign from a common source, their mother, and stand before the court in the same attitude as if they had inherited Otterburn Plantation jointly, and then undertaken to amicably divide the same, the appellee to get four hundred acres, and the appellant the balance of the place, and a mutual mistake had occurred in their deeds of partition. As said by the court "the power of a court of equity to reform instruments and correct mistakes growing out of such transactions in proper cases is universally recognized."

Counsel cites a great many cases holding that a court of equity will not reform a voluntary conveyance. As announcing abstract principles of law, they are correct, but they have no application to the instant case.

STEVENS, J., delivered the opinion of the court.

Appellant, as defendant in the court below, prosecutes this appeal from an order overruling a demurrer to the bill of complaint exhibited by appellee T. H. Spencer, seeking to reform a deed executed by Carrie T. Spencer, the mother of the parties hereto, whereby certain lands were conveyed to the appellee and in which there is an alleged mistake. The litigation presents an unfortunate controversy between brothers. The bill charges that S. M. Spencer, Sr., the father of both appellant and appellee, was at one time the owner of certain valuable plantations in Washington county, a division of which he intended to make among his four children, the two sons, parties to this litigation, and two daughters; that while

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the property originally belong to Mr. Spencer, Sr., it was, on account of financial embarrassments, conveyed to Carrie T. Spencer, appellee's mother; that the father exercised absolute supervision and control of the property while he lived and often expressed a desire that what is known as Glenn Allen plantation should be conveyed by deed to the two daughters, and the Otterburn plantation, consisting of one thousand four hundred and eighty-two acres, should be conveyed to the two sons; that Carrie T. Spencer, the mother, was advised of these plans and concurred therein; that appellant prevailed upon his father to postpone a division of the Otterburn plantation for a year or two in order to permit appellant, who was living upon and managing or supervising this plantation, to work out a debt then existing on said property. The bill further charges that the father contemplated deeding six hundred acres of Otterburn plantation to the complainant, and the remainder, embracing the gin, mansion house, and other improvements, was to be deeded to appellant; that the latter was to discharge the indebtedness, and to build for his brother, the appellee, a residence valued at two thousand five hundred dollars; that this was the division which the parents contemplated making and which they frequently discussed with other members of the family. The bill further charges that this plan was never executed during the lifetime of Mr. Spencer, Sr., but that, after the death of the father, the mother undertook to carry out the division of the estate; that appellant, being the older of the two sons and having the active management of the property, exercised great influence with his mother, then an aged woman, and induced her to agree upon giving appellee only four hundred acres of Otterburn; that complainant in the interest of peace yielded to this plan; that appellant in the execution of this plan employed a civil engineer to partition the plantation, and himself pointed out to the engineer the land which was to be allotted to appellee and, after having the

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survey made, went to Greenville and had deeds prepared conveying to the two daughters the Glenn Allen plantation and conveying to appellant and appellee Otterburn plantation; that in having the deed prepared the deed to appellant conveyed all of the Otterburn plantation, excepting that portion conveyed to appellee, the complainant; that the separate deed in favor of appellee as a matter of fact embraced only three hundred and seventeen acres, but appellant represented both to his mother and to the complainant that it contained more than four hundred acres. The bill charges that the deed was executed as a result of the fraud of appellant and was accepted without any knowledge or intimation to the complainant that the deed had a shortage in the acreage. It is charged that eighty three acres should have been conveyed in the deed to the complainant in addition to the lands therein described, and that this eighty three acres are worth several thousand dollars. Appellant answered so much of the bill as charged fraud, and with his answer submitted a demurrer.

There is only one ground of the demurrer which merits discussion. Appellant by demurrer challenges the right of the complainant as a voluntary grantee to any reformation whatever. Appellant invokes the general rule that a voluntary conveyance is not supported by a consideration, and that such instrument cannot be reformed unless there is some consideration or unless all parties consent. The rule invoked by appellant would certainly apply were this a contest between complainant, as grantee, and his mother, the donor. The bill shows that the mother is dead, and therefore she, as grantor, cannot maintain a bill against appellant to correct the alleged mistake. This then being a contest between the two sons of the grantor, a contest between heirs, both of whom are voluntary grantees, the rule invoked by appellant does not apply. If as a matter of fact the mother intended to convey a larger portion of the plantation to the

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younger son, then his equity, in our judgment, is superior to the right of the other brother to rely upon the defense here interposed. The transaction set out in the bill is in the nature of a family settlement, and conveyances in execution of a family settlement constitute an exception to the rule. As stated by our court in *Miles* v. *Miles,* 84 Miss. 624, 37 So. 112:

"All parties deraign from a common source, and stand before the court in the same attitude as if they had inherited the property jointly, and then undertaken to amicably divide the same, and a mutual mistake had occurred in their deeds of partition. . . . The power of a court of equity to reform instruments and correct mistakes growing out of such transactions in proper cases is universally recognized."

The Miles Case is the only one by our court to which counsel direct our attention as bearing directly upon the question presented for decision. We find very few cases on the main point of this case. The cases of *Wycke* v. *Greene,* 16 Ga. 49, and *McMechan* v. *Warburton,* Irish Law Reports, 1 Ch. Div. 435 (Irish Law Reports 1895, 1896, p. 566), are applicable.

The latter case presented the same situation as here—where the donor is deceased and the contest is between the grantees. The syllabus reads:

"The court will rectify a voluntary deed after the death of the donor where it is clearly shown that, through mistake, the deed failed to carry out the proved intention of the donor."

In the opinion of the Vice Chancellor rendered in 1894, it is said:

"It was contended by the defendant Warburton that, as this was a voluntary deed, this court cannot interfere to rectify it in favor of volunteers. The elementary principle of this court, that it will not interfere to enforce specific performance of an incomplete voluntary agreement, or to rectify an erroneous voluntary disposition of proper-

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ty in favor of a volunteer, is subject to this exception, that after the death of the donor it will interfere to rectify a disposition which is clearly proved to have, through mistake, failed to carry out the proved intention. The principle is, I think more correctly stated by confining it to this, that the court will not rectify a voluntary disposition against the donor. That it will do so in favor of a donor is shown by the case of *Lackersteen* v. *Lackersteen,* 30 L. J. Ch. (N. S.) 5, where a voluntary settlement was rectified by WOOD, V. C., at the instance of the settlor. This explains the view taken by ROMILLY, M. R., in *Lister* v. *Hodgson,* L. R. 4 Eq. 34, where he stated the exception I have mentioned in case of a deceased donor, that upon clear proof of the intention of the donor, which, by a mistake, was not correctly carried out by the instrument of gift according to such intention, this court will interfere to correct the mistake, and thus act in favor of the intention. If the donor were living it would have, of course, been competent for him to consent to such rectification, or to dissent from it. If the later, it could not be reformed against his will, for a volunteer must take the gift as he finds it; but after his death, and in absence of proof of any change of intention, it cannot be assumed that he would have dissented, and it might even be presumed that he would not dissent. In this view, *Lister* v. *Hodgson,* L. R. 4 Eq. 30, is not a departure from the true principle, and it is certainly an authority for the plaintiffs on this point."

The court of appeal unanimously affirmed this decision of the Vice Chancellor, and the language which we have quoted, we believe, expresses the better view. We unhesitatingly adopt it as equitable. The action of the learned chancellor in overruling the demurrer is approved, and the cause remanded, with leave to appellant to answer the bill within thirty days after receipt of mandate by the chancery clerk.

Affirmed and remanded.

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WESTERN UNION TELEGRAPH CO. v. MEEK.

[75 South. 772—74 South, 788, In Banc.]

TELEGRAPH AND TELEPHONES. *Failure to transmit message. Statutes.*

Under Laws 1908, chapters 76-78, penalizing telegraph companies for failure to deliver a message after it has been received at the place of delivery; where a telegram was telephoned by an employee of the telegraph company at an intermediate office to the residence of the sendee, using a telephone company with which the telegraph company had no contract and received by one who promised to deliver it to the sendee and was not afterwards telegraphed to the telegraph office of sendee's place of residence, in such case the telegram was not in fact sent over the telegraph company's wires to the sendee's place of residence, and the company was not liable under the statute for failure of its office to produce the telegram on the demand of the sendee.

ON SUGGESTION OF ERROR.

For former opinion, see 74 So. 788.

J. A. Sykes, for appellant.

This is a suit to recover the twenty-five dollars, statutory penalty for the appellant's failure to deliver a message under Laws 1908, chapter 76, page 65, which reads as follows: "A telegraph or telephone company shall deliver all messages addressed to a person residing or having a place of business in any city, town, or village where it may have an office, or within one mile of its office; and if any telegraph or telephone company shall receive any message or matter for transmission, and shall fail, neglect or refuse, without good and sufficient reason, to transmit correctly or deliver the same within a reasonable time to the person addressed, such person, or the person injured, shall be entitled to recover of the company in default the sum of twenty-five dollars in addition to damages for any injury."

The court will see from the statement of facts and the record in this case that this message was never transmitted to Columbus, its destination. For this reason, the

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statute does not apply, as this is a suit for the delivery penalty, not a delay transmission. The statutory penalty of fifteen dollars for a delayed transmission does not figure in this suit at all. (Laws 1908, ch. 78.).

In order for the delayed delivery penalty to be recovered, there must be a transmission to the office of the destination of the message—a completed transmission. A receipt of said message by said office of destination which in this case was the Western Union Office at Columbus, Mississippi; and a consequent failure to deliver the message within a reasonable time without good and sufficient reason to the sendee. In other words, a delivery of any kind, presupposes a complete transmission and receipt. Until a message is so transmitted and received, it is not in the attitude to be delivered, in fact it is an impossibility to make delivery, for there is nothing to deliver. And certainly if there is nothing to deliver then most assuredly, there is nothing to which a penalty for a delayed delivery could attach to.

The case of *Marshall* v. *Telegraph Company,* 79 Miss. 161, decides this point, where the court speaking through Judge WHITFIELD, says: "We understand both cases to hold that it is competent for a state in the exercise of its police power, to enforce a reasonable penalty for a failure on the part of the company to deliver within a reasonable time without good excuse therefor from the office of the destination to the sendee, a telegram transmission being wholly over, and this the Alexander case (66 Miss. 161) holds." This case was expressly reaffirmed in *Telegraph Company* v. *Hall,* 79 Miss. 623.

These Marshall and Hall cases also hold that this delivery statute being penal must be strictly construed. In both of the above cases, the messages were promptly delivered after being received by the office of destination but were delayed in transmission.

Miss Peters of the appellant's office at Jackson, Mississippi, reeeived this message from Memphis, Tennesses.

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It was after office hours at Columbus, and that office was, of course, closed; consequently, she called for Meek over the 'Phone, but was unable to get him. As narrated in the statement of fact, she read the message to Holesapple, who told her he would take the message for Meek. And thinking the message was delivered, it was never transmitted to Columbus, which fact is absolutely undisputed.

If it is therefore undisputed that the message was never transmitted to Columbus, then under the Marshall and Hall cases holding that the transmission must be wholly over, then certainly the penalty cannot be recovered in this case. If there is any penalty at all recoverable in this case, it is the penalty for a delayed transmission. This, however is not sued for.

Should it be argued in this case that a delayed transmission would cause a delayed delivery, the two penal statutes to say nothing of the Marshall and Hall cases would rob such a contention of its merits. The two statutes clearly show that it was the legislative intent to penalize two things: one a delayed delivery, the other a delayed transmission. The statutes are plain, and do not require the strict construction to which they are entitled. So therefore, if a plaintiff sues for one of these penalties, he must sue for the right one. He cannot recover the delayed transmission penalty for a delayed delivery, nor can he recover the delayed delivery penalty for a delayed transmission as in this case. It is therefore up to him to know how he has been wronged, if wronged he is, and having filed his declaration, he must stand by it.

We therefore submit that for the reason sent forth in this brief, the peremptory instruction allowing plaintiff to recover the statutory penalty for a delayed delivery was error, and that the case should be reversed and judgment entered here for appellant.

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W. C. Meek, for appellee.

I have argued this case different from most case, in a practice now in Mississippi, at Columbus, Mississippi, of over thirty-seven years; on account of its being a case near my heart on account of the oppression of my nephew, and it being so gross, etc., I "filed" for him this suit and won. I ask the judgment be affirmed, for the presumption of law is, the lower court acted correctly and an affirmation should follow. There is absolutely no error at all in the case; no interstate commerce, and could not be on the facts and case honestly made here. On interstate Commerce, 162 U. S. 650, 663, 40 "L," page 1105. *Western Union Telegraph Co.* v. *James.*

COMMERCE: State law requiring prompt delivery of telegrams is valid police regulation even as to messages from other states. *James Case* in 162 U. S. Reports, pages 650, 653 and 663. Legislation of a state, aiding commerce is valid. Commerce: State imposition of a penalty for telegraph company's neglect of legal duty is not commerce regulation see same James case above, pages 650, 653, 654, etc., numerous other cases. This case of James, Your Honors, is my case here, on all-fours a suit for penalty and damages. Please see and read it. We rely on the James case fully as it is like our case, here. Case here should be affirmed and we are satisfied on an affirmation for the penalty of twenty-five dollars.

We ask in law an affirmation and cite James case, a Georgia case, for the penalty, Congress has not acted on Telegraph messages, etc. We will ask no further time as our case has to be affirmed, in law.

The James Case says: A state statute imposing a penalty for lack of due diligence in delivering a telegram is made in the reasonable exercise of the police power of

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the state is not an unconstitutional interference, with interstate commerce as applied ever to interstate messages, in the absence of any legislation by Congress on the subject. *James Case,* 162 U. S. 40 "L" Ed., page 1105, same 162 U. S. pages 650, 663. This settles the case. This was not interstate; Tunica, Mississippi to Columbus, Mississippi, for a nondelivery. James case settles it. Congress never has acted on the subject here. I have all congressional acts, etc., and it has not done so. So we win an affirmation. Commerce. State law requiring delivery of telegrams, is valid police regulation, even as to messages from other states. See *James Case,* 162 U. S. page 653. Same approved, in 94 S. E. 429 and many other cases. Legislation which is a mere aid to commerce may be enacted by a state. Same James case above. Commerce states imposition of a penalty for Telegraph Companies neglect of legal duty is not commerce regulation. Same case as above, page 661. Same approved in 169 U. S. 634. Telegraphs right of receiver of message to collect statutory penalty for its delayed delivery is unaffected by senders contract. Same case; all in *James Case,* 162 U. S. pages 650 and 653. Same in Law. Lawyers Cooperative Edition, No. 40, page 1105, bottom of page. A state statute imposing a penalty for lack of due diligence in delivering a telegram is made in a reasonable exercise of the police power of the state, is not an unconstitutional interference with Interstate Commerce as applied to interstate messages, in the absence of any legislation by Congress on the subject. Here, cases at bar no interstate purely intrastate—inside of state, penalty, nondelivery in state, or messages sent in the state from Tunica, Mississippi, in the state to Columbus, Mississippi, in the state, hence; even if above recovery has to be had here of penalty and Congress has never regulated or passed any law on the subject and none can be shown, for there is none. See *James Case* above, 162 U. S. pages

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650 and 654. Same Law, Ed., page 1105. An action for a penalty for delay in delivering (hence an utter failure to deliver at all; a non-delivery) a telegram is unaffected by any stipulation as to any liability, etc. Here a suit for the penalty, etc., for a failure to deliver at all, and not any concern at all as to transmission, how sent, etc. Here a failure to deliver. In the James case, it is said: Can it be said that the imposition of a penalty for the violation of a duty which the company (this same appellant here, too) owed by the general law of the land (state) is a regulation of or an obstruction to Interstate Commerce within the meaning of that clause of the Federal Constitution under discussion here. We think not. Although a message from another state (here, case at bar, same state) comes from a place outside of the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery). Case at bar here, no interstate at all. Tunica, Mississippi, to Columbus, Mississippi, and if sent around the world to reach these two inside intrastate towns in same state, no interstate in it. But if it was, and it was not as in James Case, Alabama to Georgia, the penalty was allowed by the U. S. supreme court and supreme court of Georgia (90 Georgia, page 258) and said no interstate even then, so defense of appellant of telephoning as it alleges in its legal plea, is of no effect and void. The peremptory instruction was proper. The jury would have given more than the penalty. Defendant appellant ought to be satisfied. See *Allen Case,* 66 Miss. 557; *McInnis* v. *N. O. & N. E. R. R.,* 68 So. 483. The *James Case* in 162 U. S. page 650, has settled the law in plaintiff's appellee's favor here, and its reasoning is correct and the judgment of the Lowndes county circuit court should be, and we believe will be, by this Honorable court here, affirmed.

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STEVENS, J., delivered the opinion of the court.

The judgment rendered by the lower court in this cause was affirmed on a former day of this term. On consideration of the suggestion of error, we are driven to the conclusion that the case must be reversed, unless we overrule prior decisions of our court. The facts, briefly stated, are as follows: On June 18, 1915, Sterner Meek, at Tunica, Miss., sent the following message:

"Seth A. Meek, Columbus, Miss.: Come to Tunica for week-end house party, if possible. Leave Columbus tonight, and come via Winona and Memphis. Wire answer. STERNER.

"Do come. Miss Abbay."

The office of the Western Union Telegraph Company at Tunica was closed for the night at the time Mr. Meek desired to deliver the message to the telegraph company, so he delivered the message to the long-distance telephone operator for the Cumberland Telephone Company at Tunica, who phoned the message to the Western Union Telegraph Company at Memphis, and the telegraph company at Memphis, Tenn., accepted the message for transmission to Columbus, Miss. The message was transmitted by the Western Union Telegraph Company to Jackson, Miss., and received by the Jackson, Miss., office at eight forty-four p. m. the same night it was forwarded. The message was received at Jackson by Miss Peters, the night clerk, who, finding that Columbus, Miss., office was closed for the night, called Seth A. Meek, the sendee, over long-distance telephone at Columbus, Miss. Miss Peters was unable, it seems, to get Seth A. Meek at the other end of the line, but one Mr. Holesapple answered the long-distance call at Columbus and advised Miss Peters that he could take the message and deliver the same to Mr. Meek. Thereupon Miss Peters delivered Holesapple the written message over the telephone and marked the written message at Jackson as "Delivered."

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It appears that Miss Peters considered the message delivered. Holesapple did not deliver the message to Seth A. Meek until the next morning, when he advised Mr. Meek that the Jackson, Miss., office had called him over the long-distance telephone the night before and had a message for him in reference to a house party. Mr. Meek then went to the local office of the Western Union Telegraph Company at Columbus, and asked for the message. The Columbus office thereupon advised Mr. Meek that they had not received a message and had no message to deliver. This action was thereafter instituted by Seth A. Meek for the recovery of one thousand dollars punitive damages and twenty-five dollars as the statutory penalty for failure to deliver the message within a reasonable time. On the trial of the case the court granted a peremptory instruction in favor of the defendant as to any punitive damages, but gave a peremptory charge in favor of the plaintiff as to the statutory penalty of twenty-five dollars. From the judgment awarding plaintiff the statutory penalty, the telegraph company prosecutes this appeal.

By reference to chapters 76 and 78, Laws of 1908, it will be seen that there are now two statutes imposing penalties on telegraph companies. Chapter 76 is as follows:

"Section 1. Be it enacted by the legislature of the state of Mississippi: A telegraph or telephone company shall deliver all messages adressed to a person residing or having a place of business in any city, town, or village where it may have an office, or within one mile of its office; and if any telegraph or telephone company shall receive any message or matter for transmission, and shall fail, neglect, or refuse, without good and sufficient reason, to transmit correctly or deliver the same within a reasonable time to the person addressed, such person, or the person injured, shall be entitled to recover of the company in default the sum of twenty-five dollars, in addition to damages for any injury."

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"Sec. 2. That this act shall take effect and be in force from and after its passage."

"Approved March 20, 1908."

The manifest purpose of this statute is to penalize telegraph companies for failure to deliver a message after it has been received at the office of the sendee. The other statute (chapter 78) imposes a penalty of fifteen dollars for delayed transmission. Counsel for appellee in his reply to the suggestion of error admits that this suit is not "for a delay in transmission," but "for negligence and gross failure to deliver at all." It is elementary that a penal statute must be strictly construed. Bearing this in mind, we are confronted with a state of facts showing conclusively that the message in this case never did reach Columbus over the wires of the Western Union Telegraph Company. It is the contention of appellee that the message reached Columbus by telephone, and that therefore the statute against failure to deliver is violated. The fact is, however, that the message was transmitted over the wires of the Western Union Telegraph Company to Jackson, and there stopped so far as any transmission by telegraph is concerned. The effort of Miss Peters to phone the message was not in fact a sending of the message into Columbus over the wires of the Western Union. The parties in this case had no contract with the Cumberland Telephone Company whereby the message was to be sent from Jackson to Columbus by telephone, and the effort of the plaintiff in this case is not to hold the telephone company liable, but to recover from the telegraph company. There is a material difference in the system employed by telegraph and telephone companies. The well-known system employed by the telegraph company is to send the message to the office of the telegraph company where the sendee resides or is to be found, and the operatives there are charged with the duty of receiving the message, of writing it out, keeping a record of it, and of delivering to the sendee the written message itself. If

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this system had been complied with in the instant case, the Columbus office would have received this message, made a record thereof, and been in position to deliver Mr. Meek a copy. By this system there is private and confidential communication between sender and sendee, and by this system there is manual delivery of the written message to the sendee personally.

One statute penalizes a delay in transmission, and another statute, the one here invoked, is designed to penalize the telegraph company for delays incurred at the office of delivery, after the message has been correctly transmitted to the place of delivery. The statute relied on here strikes at the negligence of the operatives at office of delivery. So we have a case where admittedly the Columbus office of the Western Union never in fact received a message which could there be delivered. There is no liability whatever for the twenty-five dollar penalty. Disposition of this appeal is controlled by the cases of *Marshall* v. *Telegraph Co.*, 79 Miss. 160, 27 So. 614, 89 Am. St. Rep. 585; *Telegraph Co.* v. *Hall*, 79 Miss. 623, 31 So. 202, and *Telegraph Co.* v. *Ross*, 111 Miss. 649, 71 So. 904.

The suggestion of error will be sustained, the judgment of the learned circuit court reversed, and judgment entered here in favor of appellant.

Reversed, and judgment here.

SYKES, J., being of counsel in the trial court, took no part in this decision.

ETHRIDGE, J., (dissenting). I am unable to concur in the conclusion reached by the majority in this case, for the plain and simple reason that I think this record shows that the message was sent to Columbus, Miss., by an agency of the Western Union Telegraph Company regularly used in its business, and was received by a person selected by the Western Union Telegraph Company to receive said message for it. It appears in the record that

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the message was originally tendered to the agent of the Cumberland Telegraph Company at Tunica, Miss., and phoned to the Memphis office of the Western Union Telegraph Company under and by virtue of a regular understanding and arrangement between the Western Union Telegraph Company and the Cumberland Telegraph Company. This is testified to by Mrs. J. O. Morrow, a witness for the defendant Western Union Telegraph Company, and who collected the fees for the transmission of such message according to the usual arrangement in the course of business between the two companies. The Memphis office telegraphed the message in question to the Jackson, Miss., office, and it was received at the Jackson, Miss., office at eight forty-four p. m. by Miss Eileen Peters, night clerk of the Western Union Telegraph Company, at Jackson, Miss. She testified, identifying the message in suit, and to the fact that it was received at eight forty-four p. m. I quote from her testimony as follows:

"Q. From what office was it transmitted to Jackson? A. From Memphis. Q. What did you do with the message after you received it? A. I put a call in for Columbus at eight forty-six. Q. How did you put a call in? A. By long-distance telephone. Q. And you asked for what? A. I called for Mr. Seth A. Meek at Columbus. Q. Who did you get? A. I didn't get Mr. Meek. I got Mr. Holesapple. Q. Did you or not at that time have a conversation with Mr. Holesapple? A. I did, yes. Q. Please state what that conversation was. A. He told me that Mr. Meek worked for him, or with him, and I understood him to say that he roomed with him, and he said that Mr. Meek was out, and he didn't know what time he would be back, and he said he could take the message, and I gave it to him that night; he asked to take the message himself. Q. Please state what you did then. A. I gave the message to him just as I had received it. Q. What time did you give the message to him? A. Nine o'clock.

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Q. I will ask you, Miss Peters, why did you telephone this message from Jackson, Miss., to Columbus, Miss.? A. Because the Western Union in Columbus was closed at that time, and that is the way we handled all these messages at night. . . . Q. State whether or not your office made any further or other attempt to deliver the message after you phoned it. A. No, sir; we considered it delivered then. . . . Q. Why didn't you make any other effort to deliver the message? A. Because we considered it delivered, and they are never sent over wires when they are phoned; that is the customary way to deliver messages at night. Q. But why did you try to deliver it that night; why didn't you wait until the next morning? A. Because it was a straight day message and should be delivered at once."

On cross-examination this witness was asked the following questions and gave the following answers:

"Q. Isn't it the custom of the Western Union Telegraph Company to receive all messages handled in writing and then telegraph that message with a telegraph instrument to the next operator, and then in turn that operator takes it down in writing, and then folds it up and puts it in an envelope and delivers it to a messenger boy, to be delivered only personally to the person addressed, or, if he can't deliver it to the particular person addressed, then to leave a written notice at his place of residence or place of business? A. That is the custom when the office is open. . . . Q. Then the Western Union Telegraph Company didn't send this message as the laws require them to do it, did they? A. No, sir; I suppose not; I don't know about the way the law requires it to be done; I am governed by the rules of the company. . . . Q. I believe I understood you to say that you did not deliver this message to Meek or his authorized agent? A. No, sir; I did not. Q. But you delivered it to one Mr. Holesapple, whom you say told you that he roomed with Mr. Meek, and that he would deliver the message that

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night. A. Yes, sir; he asked to deliver it, and said he would do it that night."

On redirect examination this witness testified as follows:

"Q. Counsel has asked you about the usual and ordinary way to send telegraphic messages, and you replied that you sent this message in the usual and ordinary way, and that the way he described was the usual and ordinary way when the office was open. What do you mean by that? A. I just meant that the Columbus office was closed at night, and that it was impossible to make a delivery over the wire, and that it was the usual and customary way to phone the regular straight day message when the office was closed. Q. I will ask you to state whether or not you have ever delivered a message or messages over the telephone as well as by messenger boy. A. Yes, sir; we deliver over half of them by telephone. Q. You deliver over one-half of your messages by telephone, instead of by messenger boy; then you do deliver over the phone as well as by messenger boy? A. Yes, sir, . . . Q. Please state how Mr. Holesapple—please state how you understood Mr. Holesapple was taking this message when you delivered it to him. A. He took it as a friend, and he told me that Mr. Meek was out. Q. Did you understand that he was taking it down in writing? A. No, sir; I didn't know; I didn't understand how he was taking it, but he repeated it after me, and said that he would deliver it that night; then I considered it delivered."

Mr. Meek testified Mr. Holesapple was not authorized to receive this message for him, and that he never in fact delivered the message, and that on the following morning he called at the Western Union Telegraph Company for the message, and the company promised to get it and deliver it, but never did so. It appears conclusively from the above quotation from the record that the message was actually delivered to Columbus over an instrumentality regularly used by the Western Union Telegraph Com-

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pany in delivering its messages to its customers. Witness introduced by the Western Union Telegraph Company testified that Mr. Holesapple repeated the message to her as she delivered it to him, and that she sent the message to Columbus just like it was received in Jackson. It is difficult for me to understand how it would be material whether the message was sent over the wire by means of a combination of dots and dashes, or whether it was sent over the wire by an electric current and the vibrations of the human voice, so long as the message actually was sent to Columbus. It appears from the testimony of the Western Union Company itself that it was using the wires of the Cumberland Telegraph Company, in all cases where its offices were closed at night, for the purpose of delivering the messages to its customers. The wires of the Cumberland Telephone & Telegraph Company, for the purpose of delivering the message, were the wires of the Western Union Telegraph Company. This appears in this record and beyond dispute, and it further appears that more than one-half of the messages are delivered by phone rather than by messenger. In addition to this it is well known that this particular company used the telephone system and wires as a part of its telegraph system, and that it filed its contract of plans and arrangements with the Railroad Commission, and received permission from the Railroad Commission to make this arrangement, with the provisos and understanding that the charges would not exceed the regular message rates of the telegraph company. See 14th Biennial Report Mississippi Railroad Commission, p. 78.

The construction of the duties and liabilities of the company under the act quoted in the majority opinion enables the telegraph company to escape responsibility for its negligence in the conduct of its business, when there is nothing in the message to show that there was any exemption from liability written on the message,

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making the Cumberland Telegraph Company merely an agent of the sender, as is often the case in telegraph messages. The contract here was a straight and simple contract to deliver the message. The message actually went to Columbus, Miss., but was never delivered to the sendee, though he lived in Columbus, Miss., and called on the company for the message after being advised that such message had come to Columbus. In *Nelson* v. *Illinois Central R. R. Co.*, 96 Miss. 295, 53 So. 619, 31 L. R. A. (N. S.) 689, it was held that the railroad company was liable for the negligence of the employees of a sleeping car company, where the sleeping car was attached to and pulled by the train of the railroad company. Numerous other cases supporting this principle could be cited, but the principle is clear that a party cannot use an instrumentality in its business and escape responsibility for the negligence resulting therefrom.

MOBILE & OHIO R. Co. *v.* FARRIOR.

[75 South. 777, Division A.]

1. CARRIERS. *Carriage of passengers. Conduct of conductor. Sufficiency of evidence.*

   In a suit by a passenger against a railroad company and its conductor for actual and punitive damages, because of the conductor's conduct in insisting that plaintiff had not purchased a ticket to her destination, the court held that the facts set out in its opinion did not show that the conductor failed to treat plaintiff with proper courtesy, and plaintiff failed to make out a case for punitive damages.

2. NEW TRIAL. *Jury. Impeachment of verdict.*

   Notwithstanding the facts that now nine jurors are permitted to render a verdict in a civil case, this does not change the rule that a juror is not allowed to impeach the verdict of the jury, since the verdict is still the verdict of the whole jury though it takes only nine jurors to arrive thereat.

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APPEAL from the circuit court of Lauderdale county. HON. R. M. HEIDELBURG, Judge.

Suit by Mrs. Ether Farrior against the Mobile & Ohio Railroad Company and another. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Baskin & Wilbourn, for appellant.

Fewell & Cameron, for appellee.

SYKES, J., delivered the opinion of the court.

The appellee, Mrs. Farrior, instituted suit against the Mobile & Ohio Railroad Company in the circuit court of Lauderdale county for actual and punitory damages based upon the following facts as testified to by the plaintiff in the court below:

Mrs. Farrior testified that she had been to West Point, Miss., with her husband, and that on her way to the station with him he gave her two dollars and ninety-five cents with which to purchase a ticket from West Point to Meridian; that she told the ticket agent at West Point to sell her a ticket to Meridian. He told her the price was two dollars and ninety-three cents. She gave him two dollars and ninety-five cents and he returned three cents in change. Her husband also gave her five cents to buy, as she said, a "dope" on the train. The three cents and five cents she deposited in her suit case. She boarded the train for Meridian, and nothing transpired until it reached the town of Macon. We now quote the testimony of Mrs. Farrior:

"The train stopped, and the flagman came through and called out Macon, and nobody didn't get off, and then I believe Mr. Sweatman came in as far as the door and hollered, 'Macon,' and I happened to look up, and he was looking at me. I turned around behind me to see if there was anybody back there. I says: 'Are you looking at

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me?' He says: 'Yes; are you going to get off?' I said: 'No; I bought a ticket to Meridian.' He says: 'What did you pay for the ticket?' I said: 'I paid two dollars and ninety-five cents for it.' He said: 'That is the fare all right, but you didn't pay that.' I said: 'Yes; I did.' He says: 'What is your name?' I said: 'When I bought a ticket I didn't have to give my name.' He says: 'Well, you didn't buy a ticket to Meridian; I will wire the agent at West Point.' So, with that, he walked on out, and in a few minutes he came back, and he was very excited, and said: 'The ticket agent at West Point says you didn't buy a ticket.' I says: 'He must be mistaken; I did.' He says: 'The train has been delayed longer than it ought to be; we have to go, and you will have to get off.' I says: 'No, sir; I am not going to get off, because I don't know anybody in Macon, and besides I have no money to pay my expenses.' He says: 'I will go out and wire the superintendent and see what he says.' And he went on, and he came back and says: 'Have the marshal of the town take you off.' And with that I felt very embarrassed and started to crying. He said something. He didn't come to my seat, but stood way up in the aisle. I told him that my father worked for the Mobile & Ohio Railroad Company, and he was going to meet me at the train and he would pay my fare, and he wouldn't do that. He says: 'Give me that suit case and I will hold it for your fare.' I didn't say anything. He says: 'Are you going to give me that suit case?' I said: 'There it is.' And he took the suit case and handed it to the flagman, and he took out a piece of paper and wrote something on it, but I didn't take it; it dropped on the floor. After he went out I picked it up. Well, there was nothing more done about it then, and in a few minutes—well, there was two or three men said—Mr. Breland said before he would see Mr. Sweatman put me off he would pay my fare. Then Mr. Sweatman carried the suit case out, and in a few minutes Mr. Sweatman came back with a note

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saying that some Mr. Ellis wrote on the note and said he had paid my fare and I could get my suit case and he would be at the Meridian Hotel for a week, and if I wanted to pay him back it was all right. I told Mr. Sweatman I didn't want him to bother me any more, that I had paid my fare, and didn't intend to pay it any more, but in a few minutes the man himself came and says: 'Lady, I have paid your fare, and you can get your suit case.' I says: 'I have paid my fare.' And he went off and laughed as he went off, and that was all that was done then."

At another place in her testimony she stated that the conductor said that the ticket agent at West Point wired him that he had not sold any tickets to Meridian at all. The piece of paper given the plaintiff was a cash fare receipt for fare from Macon to Meridian. Her suit case was left in the office of the ticket agent at Meridian. Several days after reaching Meridian Mrs. Farrior went to the station, in company with her attorney, and was given her suit case, but did not pay the cash fare from Macon to Meridian. She also testified that she was embarrassed on account of the conversation with the conductor. Several other witnesses who heard parts of the conversation, and who testified on behalf of plaintiff, said that the conductor was not rude or insulting in his manner toward her. The uncontradicted testimony further shows that the conductor wired to the ticket agent at West Point and asked him if he sold a ticket to Meridian for that train, and that the agent replied that he had not. It also shows that the conductor wired the superintendent to know what he should do under the circumstances, and that he delayed the train in Macon ten minutes in trying to get this matter properly settled. The concluding paragraph in the declaration is as follows:

"Plaintiff alleges that by reason of the foregoing acts of willful, wanton, and gross negligence and abuse and grossly insulting conduct towards her on the part of the

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conductor that she was damaged, and therefore she sues and demands judgment against the defendants, the Mobile & Ohio Railroad Company and Dan Sweatman, both for actual and punitive damages in the sum of twenty-five thousand dollars."

The jury returned a verdict in favor of the plaintiff for the sum of three hundred and eleven dollars, upon which judgment was duly entered, and from which judgment this appeal is prosecuted.

The question of punitive damages was submitted to the jury. The uncontradicted testimony further shows that the plaintiff did not examine her ticket when she purchased it, and, as a matter of fact, did not know whether the agent had given her a ticket to Meridian or to Macon. It further shows that, as a matter fact, the ticket given to the conductor by her was one to Macon. If a mistake was made in the ticket, it was made by the ticket agent in West Point, and not by the conductor. After she explained to the conductor her version of the matter, the conductor did all that he could have done to ascertain whether or not there was a mistake. He wired the agent at West Point, and was told by him that no mistake had been made. He then wired the superintendent of the railroad company for instructions. All the other witnesses in the case testify that his manner was in no way insulting, rude, or abusive. As to exactly what was said by the conductor and Mrs. Farrior, there is some contradiction, but the verdict of the jury has resolved these facts in her favor.

Taking her testimony, we unhesitatingly say that there is nothing from which it can be inferred that the conductor did not treat her with sufficient courtesy. We therefore conclude that punitive damages could not be recovered in the case.

Another question which is raised by the appellant railroad company, and which is of first impression in this court under the new law allowing nine jurors to return a

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verdict, is this: It seems that this was a verdict rendered by nine jurors. One of the three jurors who did not agree to it was presented as a witness to impeach the verdict of the jury and to testify that the same was arrived at by adding up the various amounts suggested by each of the nine jurors, dividing the sum by nine, and the verdict was the quotient thereby obtained; in other words, that is what is known in common parlance as a "chance" verdict. This court has uniformly held, under the unanimous verdict rule, that a juror is not allowed to impeach the verdict of his jury. The same reasons apply with equal force now as applied then. The verdict is still the verdict of the jury as a whole, though it takes only nine jurors to arrive thereat. The lower court was therefore correct in excluding this testimony.

Reversed and remanded.

Mississippi Railroad Commission v. Mobile & O. R. Co. et al.

[75 South. 778, Division A.]

1. Railroads. *Injunction. Order of railroad commission. Establishment of station.*

   Where a railroad company objects to the reasonableness of the orders of the railroad commission, in requiring the erection of a new depot, injunction is the proper remedy, since in such case the commission in making such order was acting in its legislative or administrative capacity and not in a judicial or *quasi* judicial capacity.

2. Action Attacking Railroad Commission's Order. *Burden of proof.*

   Under Code 1906, section 4836, so providing, the order of the railroad commission establishing a depot was *prima-facie* correct and proper and one who attacks such order has the burden of proving its unreasonableness by "clear and satisfactory evidence."

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3. REVIEW OF CHANCELLOR'S DECREE DISAPPROVING RAILROAD COMMISSION'S ORDERS.

The decree of a chancellor, disapproving the orders of the railroad commission, requiring the erection of a railroad depot, will be given the same force and effect by the supreme court on appeal as other decrees by the chancellor, and if there was testimony upon which the chancellor could have made his decree, his findings will not be disturbed on appeal.

4. SAME.

In this case the court held that there was evidence sufficient to sustain the decree of the chancellor in disapproving the order of the railroad commission requiring the erection of a new passenger depot.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Bill by the Mobile & Ohio Railroad Company and another against the Mississippi Railroad Commission, to enjoin the commission from executing its order requiring the erection of a passenger and freight depot and alteration of tracks. From an order making the injunction perpetual, the commission appeals.

The facts are fully stated in the opinion of the court.

Ross A. Collins, attorney-general, for appellant.

The chancellor tried the case as though he had original jurisdiction to make the orders made by the railroad commission. He should have either sustained the orders or held that they were unreasonable or unlawful. On this point I refer the court to the case of *Minn., St. P. & S. Ste. M. R. Co.* v. *Railroad Commission,* 17 L. R. A. (N. S.) 821; *Bannon* v. *Insurance Co. of N. A.,* 115 Wis. 250, 258, 91 N. W. 666; *Shaw* v. *Gilbert,* 111 Wis. 165, 86 N. W. 188; *Dallman* v. *Clasen,* 116 Wis. 113, 117, 92 N. W. 565; *Harrigan* v. *Gilchrist,* 121 Wis. 127, 313, 99 N. W. 909; *Illinois C. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 421, 51 L. Ed. 1128, 27 Sup. Ct. Rep. 700; *Chicago, R. I. & P. R. Co.* v. *Nebraska Railroad Commission,*

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reported in 26 L. R. A. (N. S.) on page 448; *Morgan's L. & T. R. & S. S. Co.* v. *Railroad Commission,* 33 So. 220; *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission,* 206 U. S. 1, 26, 51 L. Cas. 398; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; *I. & L. R. Co.* v. *Railroad Commission,* 38 Ind. App. 349, 78 N. E. 338, 79 N. E. 520; *Steenerson* v. *Great Northern R. Co.,* 69 Minn. 353, 72 N. W. 713.

For further reference to authorities on the power of courts of appeal from the orders of the Railroad Commission, see case note 49 L. R. A. (N. S.) 570. The proper remedy for the railroad was not an injunction but a writ of prohibition. Counsel in his last brief discusses mainly the question as to whether *certiorari* was the proper remedy and maintains that it would not be the proper relief. While I have doubts on this proposition, it is my judgment that a writ of prohibition was the proper remedy, and I do not think that the court had any right to grant an injunction.

Power of the railroad commission and attitude of the courts towards this body. Section 186, of the Constitution of the state of Mississippi, directs the legislature to provide suitable laws to prevent discriminations and extortions and enjoins upon it the duty to enact laws for the supervision of the common carriers by a commission or otherwise. I think that there can be no question about the power of the legislature, itself, independent of this constitutional provision, to enact any law necessary for the regulation of railroads. In the absence of constitutional restrictions, it could provide by special or general laws, any regulation for the government of railroads, and provide for the erection of suitable depots at any point that in the judgment of the legislature was proper.

It is familiar learning that a railroad company is a public service corporation; affected by the public use and existing for public benefit and convenience. It is a highway under our Constitution and exercises a portion

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of the powers of the sovereign state itself. Every person is forced to patronize it who carries on any business whether he wills to or not. Because of these powers derived from the state, the said railroad company owes the public the duty of managing and transacting it business in such manner as the public convenience requires and it cannot judge what the public convenience requires, but the legislature itself, or such body as it has delegated to and vested with these powers, is the judge as to what is necessary for the convenience of the public. The constitution expressly authorizes the legislature itself, or a commission to regulate these roads. The legislature has seen proper to vest these powers in the Railroad Commission and the Commission has full and plenary power given it by the legislature to deal with this subject-matter, and the acts of the Commission are therefore as efficacious and far-reaching as an act of the legislature itself would be.

I earnestly submit that the court should go as far as possible to sustain the action of an important administrative body like the Railroad Commission and should give the railroad Commission credit for the benefit of the knowledge and experience required in discharging those duties.

The courts of this state heretofore have seemingly been hostile to the powers of the Commission, and seemingly have been disposed to restrict the Commission in the exercise of the discretion conferred upon them by law and have been disposed to ignore the fact that the Constitution itself enjoined upon the legislature the enactment of laws for the proper supervision of these roads. Inasmuch as this is a constitutional grant of power to the legislature, and is to be exercised for the protection of the public, it ought to be liberally construed for the purpose of giving the commission power to make the necessary orders to meet the conditions growing out

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of the progress, change and differences of conditions that rise from time to time.

The Federal courts have looked with favor upon the Interstate Commerce Commission and their decisions give vitality to this important branch of the Federal Government, while our courts have restricted and limited this commission and have rendered it almost powerless for good. The following extract from a decision of the Wisconsin court in the *Minn. St. P. & S. Ste. M. R. Co.* v. *Railroad Commission Case, supra,* shows how other states regard this important subdivision of the government. "Patience on the part of the public and on the part of the carrier and time, will be necessary."

The notion that Commissions of this kind should be closely restricted by the courts, and that justice in our day can be had only in court is not conducive to the best results. Justice dwells with us as with the fathers; it is not exclusively the attribute of any officer or class; it responds more readily to confidence than to criticism; and there is no reason why the members of the great Railroad Commission of this state should not develop and establish a system of rules and precedents as wise and beneficial within their sphere of action as those established by the early common-law judges.

I most earnestly insist that this judgment should be reversed and a decree entered here directing the railroad companies to comply with the order made by the Railroad Commissions.

Carl Fox, for appellee.

The commission exhausted its power to designate the location of a union passenger station at Corinth when it required the present union passenger depot to be built in the Southeast angle in 1902-3. It is axiomatic that the Railroad Commission has no power, and can acquire none, except that with which the legislature has invested

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it. *State* v. *A. & V. R. Co.*, 67 Miss. 647; *State* v. *Y. & M. V. R. Co.*, 87 Miss. 679, 40 So. 263; *G. & S. I. R. Co.* v. *Railroad Commission*, 94 Miss. 124, 49 So. 118.

The Commission does not of itself grow in power, nor can the court concede to the Commission any power except such as is to be found in the language of the legislature. The origin of the present statute is to be found, we believe, in section 2, chapter 26 of the Laws of 1888, page 45, which reads as follows: "... This said board is also authorized to designate the site or location of any new depot building or station house that may be ordered built in cases where the site selected by the railroad company required to erect the same is deemed inconvenient or inaccessible; ... having in view the interest of the public and the railroad company. ... They shall, where in their judgment, the occasion and the public convenience require it, cause union passenger depots to be erected ... and designating the site and dimensions of the same."

In the Code of 1892, the two provisions with reference to the location of depots and the construction of union depots were separated, and appear with no change in meaning and almost in the same words as section 4309 and 4310.

After the adoption of the Code of 1892, the case of *State* v. *Railroad Company*, 87 Miss. 679, 40 So. 263, involving the validity of an order of the Commission to erect a new passenger depot, was decided by Judges CALHOUN and TRULY, Judge WHITFIELD dissenting.

Judge CALHOUN said: "The statutes, as we think, have reference to the original establishment of depots, to the location of new ones desired by the company, and to make those already established sufficient in accommodation, and necessary facilities;" and again once erected and in operation, especially as in this case for so many years, we do not think the law designed to give the power to order new depots to suit varying conveniences."

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Judge Truly concurred with Judge Calhoun in affirming the case, but expressed no opinion on the question of the power to order a new depot and to designate its location in a town where one is already built and in operation. The language of Judge Calhoun's opinion, therefore, which we have quoted, was his opinion alone, nevertheless, in the Code of 1906, in which the statute was brought forward as section 4863, it was amended evidently because of Judge Calhoun's opinion, so as to read as follows:

"Where the site selected by the railroad officials for depot buildings or a station house erected or to be erected is inconvenient or inaccessible, the Commission may order the erection of a new building or station house and designate its site or location; but every depot must be located with due regard to the interest of the railroad and the public convenience."

There was a transposition of different parts of the section, but the sole change in its meaning was brought about by the interposition of the word "erected." Evidently Judge Calhoun's opinion called the attention of the legislature to what they considered a defect in the statute; and yet when the legislature amended the section so as to make it apply to depots erected and in operation as well as to new depots which had not yet been built, the restriction on the power of the Commission to cases where the site of the old depot had been "selected by the railroad officials" was carefully retained.

It is perfectly plain that the legislature deliberately and with a definite purpose to be just to the railroad companies limited the power of the Commission in the location of new depots to those cases in which the site of the old depot had been selected by the railroad officials. The legislature deliberately put it out of the power of the commission to require a new depot to be erected on a new site, after a former commission had required a depot to be built and had selected the site.

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In the court below it was argued that the Commission had power under section 1858 of the Code to require the relocation of the depot. We think instead of being authority for the power claimed in this case, this section furnishes a powerful argument that the commission had not any power merely because of the inconvenience of location of a depot to order a new one built, except in cases covered by section 4863. There would be no reason for section 4854 if it were not that passenger depots are frequently inconveniently located for a great many of the people living in cities who use them. It is because they are frequently inconveniently located that the legislature empowered the Commission to require railroads to permit passengers to get on and off in cities at places other than at the depot. By section 4854 the legislature provided a remedy for certain evils not covered by section 4863.

Besides, section 4863 deals specifically with the location of depots by the Commission, and section 4854 does not. In such case the specific and not the general statute governs.

WHAT IS THE LAW OF THIS CASE?

Section 4863 of the Code, by which the Commission is vested with power to order the erection of depots, requires that "every depot must be located with due regard to the interest of the railroad and the public convenience."

"The interest of the railroad" will very frequently be diametrically opposed to "The public convenience;" but in the very nature of things the railroads cannot in every case, without unreasonable sacrifice, secure to the public the greatest convenience of which the situation is capable. It is inevitable that frequently there must be a compromise between the interest of the railroad and the public convenience. If railroads could transport passengers and freight free of charge, it would be the great-

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est convenience to the public. If they could charge whatsoever they please it would be to the greatest interest of the railroads. There must be a compromise between the two extremes. That is what that part of section 4863 quoted above means. *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510; *Atlantic Coast Line R. R.* v. *North Carolina Commission,* 206 U. S. 1, 27; *Missouri Pacific Ry.* v. *Kansas,* 216 U. S. 262.

There seems to be a suggestion in the attorney-general's brief that this court should go behind the decree of the chancery court and undertake on the evidence in this case to uphold the order of the Railroad Commission because of the presumption in favor of its validity, just as if this court were sitting as a trial court; and the attorney-general copies a considerable part of the opinion in *Rock Island and Pacific R. Co.* v. *Ry. Commission,* 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444. We have no quarrel with that case, and we think it is right and proper that any order of the Railroad Commission should be held *prima facie* to be valid and correct. We do not think it makes any difference in this case whether the court occupies the chancellor's bench or whether it reviews this case as the appellate court that it is, because we do not think any reasonable man can reach any other conclusion than that embodied in the decree. But we do think that the rule ought to be properly stated.

In the case referred to which was cited by the attorney-general, the trial court upheld the order of the Railroad Commission, and the appeal was by the Railroad Companies. In this case the chancellor found that the order of the Commission was unreasonable, and the appeal is by the Commission. In that case the railroad companies carried the burden that was upon them in the trial court with the superimposed burden of the presumption in favor of the validity of the decree of the trial court. In the case at bar the Commission, and not the

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railroads, carries the burden of showing that the chancellor's decree is erroneous.

The law does not vest the order of the Railroad Commission with any greater dignity than the decree of the chancellor. The decree is the resultant of all of the forces in the case, including the presumption in favor of the validity of the order as well as the testimony of the witness and other evidence.

The presumption is that the chancellor gave full weight in his consideration of the case to the presumption in favor of the validity of the order. The chancellor dealt with the validity of the order; this court deals with the validity of the decree. The law presumes that the chancellor's decree is correct; and, necessarily, when that presumption arises upon the signing of the decree, the presumption in favor of the validity of the order of the Commission disappears. There cannot exist at the same time a presumption in favor of the correctness of the decree and a presumption in favor of the validity of the order, because the decree says that the order was invalid; and therefore the presumption in favor of the decree is a presumption that the order was invalid. If this were not true then an order of the Railroad Commission could not be set aside by a judgment or any court, because in spite of the judgment there would still be a presumption of law that the order is valid.

In this case as in every other case appealed from the chancery court of appellant (the Commission) has the burden of establishing by the record that no reasonable man could have reached the conclusion expressed by the decree. What the chancellor decided was, that the evidence in favor of the railroad companies was of sufficient weight to overcome the presumption in favor of the validity of the Commission's order. The question therefore, for this court to decide is whether any reasonable man could have reached the conclusion that

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there was sufficient evidence to overcome the presumption.

Sykes, J., delivered the opinion of the court.

The Mississippi Railroad Commission was petitioned by the Business Men's League of Corinth to require the Mobile & Ohio and Southern Railroad Companies to construct a new union passenger depot in the city of Corinth. These two railroads cross each other at almost right angles. The present union passenger station is now situated in the southeast angle, south of the Southern Railroad, and east of the Mobile & Ohio Railroad. The petitioners asked that the union passenger station be located in the northeast angle. The principal reason alleged for this change in location was in order to prevent passengers and other parties having business at the union station from crossing the tracks of the Southern Railway Company at Filmore street crossing, which is one of the principal streets of Corinth, and which is a dangerous crossing. The Southern Railroad at that time maintained nine tracks over this crossing. It was also alleged that the depot accommodations were insufficient. Already located at that time in the northeast angle—which, by the way, is an obtuse angle, as the two railroads do not exactly cross at right angles—was situated the freight depot of these two railroad companies, and also, as a necessary adjunct to the freight depot, a great many tracks for switching were therein situated. The business portion of the town of Corinth, and a great many residences therein, are also situated in this northeast angle. If the passenger depot were located in that angle, then it would obviate the necessity of crossing over the tracks of the Southern Railway Company at Filmore street crossing.

The members of the Railroad Commission personally examined the present union passenger station and the

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freight depot and railroad tracks and all the four angles. They also took oral testimony on the question, and passed an order requiring the railroad companies to construct a new union passenger depot in the northeast angle. The present passenger depot was built about ten years ago, and was the result of a citation originally issued by the Railroad Commission to these two companies, to know why it was not necessary for them to build a union passenger depot. After many continuances of that investigation, the Railroad Commission and the railroad companies, without any orders, tacitly agreed on the location of the present passenger depot. Some months after the railroad companies were ordered to build a new passenger station in the northeast angle, the one here in controversy, on subsequent petitions and an examination, these companies were further ordered to erect a new freight depot and alter certain switch tracks, also, in the northeast angle, and some across Filmore street. In other words, the orders of the Commission here involved are: First, an order requiring a new passenger depot in the northeast angle; and the subsequent orders requiring a new freight depot in the same angle, and switch-track alterations. These orders require the railroad companies to build a freight depot and switch tracks in this angle and also a passenger depot which would be in the switchyards of the company. A bill was filed by the railroad companies, enjoining the Commission from executing the order requiring the erection of the passenger depot. Subsequently to the filing of this bill, the subsequent orders requiring the erection of the freight depot and alteration of tracks were entered, and a bill of injunction was filed to enjoin the Commission from putting these orders into effect. Both these bills were filed in the chancery court of Hinds county, and by agreement the two suits were consolidated. In the trial in the chancery court,

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the defendant companies admitted the reasonableness of the order as to the freight depot and track facilities, but contended that the order as to the passenger depot was unreasonable. The case was tried before the chancellor, and a vast amount of testimony was introduced before him. The question for determination was whether or not the order of the Commission requiring the erection of this passenger depot in the northeast angle was reasonable or unreasonable.

The question is raised, but not seriously argued, that injunction was not the proper procedure by these companies. However, the Commission was not acting in a judicial or *quasi* judicial capacity in ordering the building of these depots. It was acting in its legislative or administrative capacity in doing so, and its procedure was proper, as is borne out by the authorities, which we deem it unnecessary to cite.

The principal contention of the Railroad Commission in this court is that under section 4836, Code of 1906, which reads as follows:

"Findings in Writing; Proof of; Effect of.—All findings of the Commission and the determination of every matter by it shall be made in writing and placed upon its minutes, and proof thereof shall be made by a copy of the same duly certified by the secretary under the seal of the Commission; and whenever any matter has been determined by the Commission, in the course of any proceeding before it the fact of such determination, duly certified, shall be received in all courts and by every officer in civil cases as *prima-facie* evidence that such determination was right and proper; and the record of the proceedings of the Commission shall be deemed a public record, and shall at all seasonable times be subject to the inspection of the public," the order of the Railroad Commission in this case was *prima-facie* evidence that it was right and proper, and that the lower court should have sustained this finding

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unless the testimony showed "by clear and satisfactory evidence that the order of the Commission complained of is unlawful and unreasonable;" that if in this trial there were two reasonable theories, one that the order of the Commission was reasonable, the other that it was unreasonable, then it was the duty of the chancellor to uphold the order of the Commission. *Minneapolis, etc., R. Co.* v. *Railroad Commission,* 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821. The above statute makes the findings of the Railroad Commission *prima-facie* evidence that they are right and proper. One who attacks an order of the Railroad Commission has the burden of proof resting upon him of establishing to the satisfaction of the lower court that the order of the Commission is not reasonable. This statute is perfectly plain and unambiguous. It was the duty of the lower court to give to the findings of the Railroad Commission the benefit of this statute. Without reviewing all of the testimony introduced before the chancellor, it is sufficient to say that, from this testimony, he could have found, as in fact he did, that the greatest part of the danger at Filmore street crossing would be obviated by the removal of certain switch tracks ordered to be removed by the Railroad Commission.

It was contended, and testimony was introduced by the railroad companies, that there was not sufficient ground in the northeast angle at its disposal to maintain the union passenger and freight depots and all the necessary switch tracks in that angle; that it would be highly dangerous, inconvenient and improper to maintain a passenger depot in such close proximity to the freight yards; that the passenger depot was practically a new one, was adequate and sufficient and convenient to the public and to the railroad companines, and that it would be unreasonable and confiscatory to require these companies to build another passenger depot just across the track from the site of the present one; that

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if the present one was inadequate it could be sufficiently enlarged to meet the views of the Commission and of the complaining parties. This testimony fully sustained the contention of the railroad companies. Practical railroad men, familiar with these matters, testified to this effect. Railroad civil engineers, some in the employ, and some not connected with the companies, testified that it would be impracticable to obey the orders of the Commission. On behalf of the Commission, the commissioners testified, giving their judgment that their orders were just and proper and reasonable, and that they believed these two depots and certain switch tracks could be maintained within this angle; that, in their judgment, it was not necessary to put all the tracks the railroads wanted in this angle; that certain tracks could be placed in other places by the railroad, where they would be just as useful and convenient to the railroad and to the public. A number of business men of the highest standing in the city of Corinth testified to facts sustaining the orders of the Commission. Only one expert engineer testified for the Commission. He had never been to Corinth, and only testified from certain maps and blueprints submitted to him on behalf of the Commission.

The chancellor, after hearing and considering the testimony, decided that the order to remove the passenger depot was unreasonable, and the injunction was made perpetual in that particular. He also decided that the present union station was inadequate, and ordered certain changes made in it and certain work done at the Filmore street crossing. The railroad company has not prosecuted an appeal from the latter part of this order; the Commission being the sole appellant. We are not therefore called upon to review the latter part of this decree.

It is earnestly insisted by the appellant in this case that this court, in reviewing the decision of the chan-

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cellor, should not give it the same weight and consideration on its findings of fact that it does in ordinary cases, but that we should view this case just as if we were the lower court trying the case and give to the order of the Commission the weight it is entitled to under section 4836 of the Code. Numerous decision are cited by counsel for the appellant as to what effect should be given the finding of the Commission. These decisions, however, relate only to the effect to be given to this finding by the lower court, or by the appellate court when the lower court has sustained these findings of the Commission. In the case at bar, however, the chancellor decided that the order of the Commission was unreasonable. To this decree we give the same force and effect that we do to all other decrees of the lower court. In other words, if the chancellor could have so found under the testimony, then we will not disturb his findings here. The case now under review comes to us with the finding of fact of the chancellor that the order of the Commission relating to the passenger depot is unreasonable. The decree specifically so states. There was testimony under which the chancellor could have so found. We cannot try the case in this court, as it was tried in the lower court. We give to this decree the same force and effect that we give to the decrees of all the chancery courts. The chancellor also held the orders of the Commission relative to the building of a new freight depot and the alteration of the switch tracks to be reasonable, and dissolved the temporary injunction and dismissed the bill in that case. No appeal was prosecuted from this decree of dismissal.

We, therefore, decline to disturb the findings of fact of the chancellor, and the decree is affirmed.

Affirmed.

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TRUSTEES OF WALTON SCHOOL ET AL. v. BOARD OF SUPERVISORS OF COVINGTON COUNTY.

[75 South. 833, Division B.]

1. CONSTITUTIONAL LAW. *Schools and school districts. Race legislation.*

   Act 1910, chapter 124, as amended by Act 1912, chapter 255, in reference to consolidated schools, is not in conflict with the state or federal constitution, because under the law the board has the same power to create consolidated schools for the colored race that it has for the white race.

2. SCHOOLS AND SCHOOL DISTRICTS. *Consolidated school districts.*

   A consolidated school district is simply a common school district where two or more existing schools have been consolidated into one single school district.

3. CONSTITUTIONAL LAW. *Class legislation. Pleading. Sufficiency.*

   A bill for an injunction against the issuance of bonds for a consolidated school district is insufficient to present the question whether the order creating the consolidated school was invalid because it did not provide for the maintenance of a colored school, where it did not allege, first, that there was sufficient colored children to maintain a public school and, second, where it did not allege that there was no colored school located in the territory comprising the district whereat the colored children may be educated in the same subjects taught in the consolidated school.

4. SCHOOLS AND SCHOOL DISTRICTS. *Issue of bonds. Submission to voters. Petition. Sufficiency.*

   A petition signed by twenty per cent of the qualified voters of the district requesting submission to the voters for their rejection or approval of the question of issuing bonds for the purchase of building a consolidated school, was insufficient, such petition not being against the issuance of the bonds by twenty per cent of the voters as required by law.

5. SCHOOLS AND SCHOOL DISTRICTS. *Bonds. Petition for submission to voters. Amendment.*

   The board of supervisors was right in refusing to allow an amendment to a petition to submit to the voters, the question of issuing bonds for a consolidated school, after the first Monday in July and in the absence of the petitioners, since such petition could not be amended without the consent of the parties who

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signed it and where it did not appear that twenty per cent of the qualified electors and tax payers of the district consented to such amendment.

APPEAL from the chancery court of Covington county. HON. D. M. RUSSELL, Chancellor.

Bill by Trustees of Walton School and others against the Board of Supervisors of Covington County and others. Bill dismissed and petitioners appeal.

The facts are fully stated in the opinion of the court.

W. U. Corley, for appellants.

To begin with, the writer begs the indulgence of the court to say, that this case has been hotly contested by both sides, and practically involves every legal point of our new modern school laws. Chapter 124 of the Acts of 1910, is "an act to provide for the transportation of pupils when schools are consolidated." This is the only act found in our law that authorizes school boards to consolidate schools, of a county, unless we turn to section 4512 of the Code of 1906, and by so doing, we may, by implication, infer such a power to them, the legality of such an inference we seriously doubt.

Chapter 255 of the Acts of 1912, is an act to "amend House Bill No. 58 of chapter 124 of the Laws of 1910, being an act to provide for the transportation of pupils in consolidated school districts." Sections 1 and 2 are practically the same as chapter 124 of the Acts of 1910. The legislature then went beyond its authority, and made the whole act void by adding section 3 which provides the means, or a way, for issuing bonds to build school houses, and to equip same, and further to provide a means of special taxation sufficient to pay for fuel, transportation wagons, incidental expenses and to erect and repair school buildings. It went further in section 4, and provided for the creation of graded schools. This act is therefore in violation of section 60

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of the Constitution of Mississippi, because it changed the original purpose, of the original act for the transportation of pupils, to an act for issuing school bonds and creating a system of school tax and the creation of Graded Schools. The legislature recognized the invalidity of the acts referred to, and on the 28th of March, 1914, attempted to pass an Act, which would be a "curative statute' and is known as chapter 182 of the Acts of 1914. This act is wholly void and unconstitutional as a curative statute, so far as future contingencies are concerned, for it is wholly a retroactive act. It does not live up to its title, but the body of the act treats of the past only. The same legislature, on the same date attempted further to right their wrong and passed Senate Bill No. 573, or chapter 196 of the Acts of 1914, which purports to be an act to amend section 3, of the chapter 255, of the Acts of 1912, that which is void cannot be amended so as to make it valid. None of the titles comply with section 71 of the Constitution of Mississippi and must fall because section 71 requiring the title of acts to indicate clearly the subject-matter of the proposed legislation is mandatory. *Sample* v. *Verona*, 94 Miss. 264; *Board of Levy Com'rs* v. *Royal Ins. Co.*, 96 Miss. 832.

In presenting the unconstitutionality of these acts we are not unmindful of the case of *Bufkin* v. *Mitchell*, decided by this court, December 8, 1913, and reported on 63 So. page 458. In this case this court decided that this act was valid, but it so decided on an entirely different proposition that of the question of uniformity.

"A supplemental, or amending act should indicate clearly in its title the act amended." 36 Cyc. 1029, and citations thereunder. Statutes, which are not a mere nullity of or which have not been entirely abrogated, or repealed by implication may be amended, and an act that is void cannot be amended. 36 Cyc. 1055. A statute, or its amendment, should be sufficiently comprehen-

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sive in its title and scope, so as not to be misleading in what it says, or omits to say. 109 Mo. 1. We submit that none of the titles are sufficient.

We come next to the most vital point in this case. Did the board of supervisors abuse their discretion, and act within the scope of their authority? We contend first that the petition of the adult tax payers filed on the third day of July, 1916, was sufficient, and that it was filed in time, and that to ignore it by a board of supervisors constitutes fraud itself, but before getting to this point, we submit for argument's sake that if the petition was inartfully drawn that it was a subject of amendment, and the evidence shows ample authority for the amendment, and ample request to make the amendment. Sections 300 and 301 practically gives the board of supervisors all powers conferred on any other court; section 304 confers on them all the powers conferred on a justice of the peace. Section 2728 of the Code confers upon justices of the peace all the powers incident to any court of record. Section 593 specially provides for the liberal allowance of amendments in chancery court.

Section 775 specially provides full power for the circuit court to make any amendments in pleadings before verdict. It is unquestionably true that the board of supervisors, while in session, constitute a lawful court, and so constituted, they must be there for some purpose other than to hear and determine matters coming before them, within their lawful jurisdiction. In this case we have eighty adult tax-payers, with thirty-eight of them constituting twenty per cent of such adult tax-payers as required by section 3419 of the Code of 1906, before issuing bonds.

We submit then, that with the petition worded as it was, whether amended or not, or whether amendable or not, that the relief prayed for should have been granted. In the case of *De Loach* v. *Newton*, 134 Ga.

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739, an utterly void petition was filed, and the officers desiring to do the right thing by their constituents, ordered an election, and the election was contested, and the supreme court of that state said, that the election was not void, and they went even further in that case and filed an amended petition, and still the election was upheld. Then if the election could be held, and confirmed from a negative view of the case it was certainly the duty of the court to give the affirmative relief, or *vice versa.*

In the case of *Shields* v. *Pyles,* 99 N. E. 742, the court specifically held that all of the jurisdictional facts need not appear in the petition, and it further held that the jurisdictional facts not contained in the petition could be shown by evidence, and this is the law. *Aetna* v. *Jones,* 173 Ind. 149; *Hall* v. *McDonald,* 171 Ind. 9; *Conaway* v. *Ascherman,* 94 Ind. 187; *Watson* v. *Crowsoe,* 93 Ind. 220; *Brown* v. *McCord,* 20 Ind. 270.

In the case of *Pinney* v. *Powers,* 104 N. E. 857, an amended petition was filed, and that righteously upheld, ask leave of court to amend. A petition may be amended generally, or an order to state facts which are necessary to form the foundation for an order. 16 Enc. Pl. & Pr. 517.

We submit again that under all the facts as shown by the orders, record evidence, and oral testimony, that equal rights and privileges cannot be granted in this instance. The word liberty as employed in the Constitution, guaranteeing the liberty of citizens, implies the right to follow any of the ordinary callings of life, without being trammeled. *Wilby* v. *State,* 93 Miss. 767. Again: "The thirteenth, fourteenth and fifteenth amendments to the Federal Constitution were intended to put the questions of slavery, citizenship and suffrage of colored persons forever at rest, while securing equality of rights; and these amendments are prohibitory upon the state against the denial or abridgment of

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such rights." *Donald* v. *State,* 48 Miss. 661. Likewise, an official order passed by an official board stands upon the same grounds. We submit therefore, even though we would admit for argument's sake, that the acts heretofore referred to are valid that the acts of the board are void, unlawful and unconstitutional, for the reason that it abridges the right of the negro tax-payer, within the district, no like school, being provided for them, the chancellor, having orally refused to permit evidence of this kind to be introduced, notwithstanding the fact that part of complainants, appellants here, were of the colored race. This court in the case of *McFarland* v. *Goins,* decided November 2, 1909, and reported in the 50th So. page 493, specifically held, that a like act authorizing a county to establish one agricultural High School for instruction of its white youth, and to support it by tax on all taxable property therein, contravenes Const., U. S. Amend. 14.

It has been contended that complainants have wholly failed to establish fraud on the part of the defendant. We do not think it necessary to prove that appellees were bribed, or paid for their votes, or voted in the hope of a reward, or promise. "Actual or positive fraud has been said to consist in circumventing, cheating or deceiving a person to his injury by any cunning deception, or artifice." This definition was accepted by Mr. Storey; yet constructive fraud has been said to be "an act which the law declares to be fraudulent, without inquiring into its motive." "Equity will always entertain jurisdiction to relieve from fraud, notwithstanding that the law would afford relief, either by action or defense, where such remedy would be doubtful, incomplete or otherwise inadequate." 16 Cyc. 83.

Fraud may be inferred from facts and circumstances. *Pope* v. *Andrews,* Sm. & M., Ch. 135. One is conclusively presumed to have intended fraud, if it necessarily and logically results from its conduct. *Hillard* v. *Cagle,*

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46 Miss. 309. Positive and express proof is not required of fraud, but circumstances affording strong presumption will be sufficient. *Parkhurst* v. *McGraw,* 24 Miss. 134, anything that throws light on the acts of the parties is competent. *Strong* v. *Hings,* 35 Miss. 201.

Now with the facts before us, that a petition was presented to the board of supervisors, asking for an election upon this matter, and were advised by the attorney for the board of supervisors that the petition was no petition. Attorney for petitioners fully authorized and directed by his clients standing by him, asking leave to amend the petition, and the board of supervisors sitting in the capacity of a court listening to the argument of the counsels *pro* and *con,* and then lay the petition down, and issue an order stating in the order issuing the bonds that there was no petition filed, and no protest filed, or made, in the face of eighty-five men, and their employed attorney, protesting against it begging for relief, and begging for an election, and the member of the board of supervisors from the district, in which the bonds were to be issued stating the cause of his people, the intent of their petition, and telling them that his people were against it, and that they wanted an election, and that they were against the bond issue, and that was what the petition was for, and then to come up on the witness stand and in answer to their own attorney's questions who was also the employed attorney for the advocators of the school, and say that they didn't have the matter up formally, and in the next breath, on cross-examination, say that they were in regular session, and had up the matter of issuing bonds, and were listening to the argument of counsel for both sides, and all admitting except one, that a plea was made for the amendment and that they did not allow it; and still further when they were confronted with a petition carrying more than twenty per cent. of the adult tax-payers of the Seminary Consolidated School District, drawn by

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this writer, and in exact compliance to the statute, and filed at the same time, and by the same attorney, and with the same clerk, shied out of the whole matter, and said they were not filed in time. At the same time, with their own attorney carrying around an official opinion of the attorney-general, addressed to one of their co-defendants that it was filed in time, and with the Weston v. Hancock County case before them, turned it all down, and without rhyme or reason placed a fifteen thousand dollar bond issue on the Sanford Consolidated School District, and a twenty-five thousand dollar bond issue on the Seminary Consolidated School District. The latter refusing to sell, because they admitted they were wrong when enjoined and quit, the former have been estopped from selling their bonds, because of the fact, in their eagerness to deliver their bonds and receive their money, before they could be enjoined, they issued fifteen thousand dollars worth of bonds and sold twenty-five thousand dollars. See pages 34 and 35 of the record. If all of this does not constitute fraud, we will have to admit that we do not know how to do it. The fiat of the chancellor shows that he apprehended danger by its concluding words. See page 11.

We submit that it was the duty of the chancellor to have permitted complainants to have developed their case, and that every allegation of the bill should have been covered by evidence, and that he erred in refusing to admit evidence about the meeting of the school board in executive session, and all of the facts charged in the bill, that complainant could have made proof of; that he erred in sustaining objections to the testimony of J. L. Lott.

E. L. Dent, for appellees.

Was there a petition signed by twenty per centum of the adult tax-payers of the Sandford Consolidated

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School District within the time prescribed by law against the issuance of the fifteen thousand dollars bonds. In answering this question, I can do no better than cite and quote the law giving the board of supervisors the authority to issue such bonds, which law and authority is as follows: Section 3419, of the Code of 1906.

"Before, providing for the issuance of any bonds, the board shall publish notice of the proposal to issue the same in a newspaper published in the municipality, or having a general circulation therein if none be there published, for three weeks next preceding; and if, within that time, twenty per centum of the adult tax-payers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued unless authorized by a majority of the electors voting in an election to be ordered for that purpose."

Section 333, of the Code of 1906, prescribes what shall be done by the board of supervisors before the issuance of any bonds, which as will be seen is almost exactly like section 3419, *supra*. Section 333.

To give a literal construction to the above statutes a petition signed by twenty per centum of the adult tax-payers of the district must be filed within the three weeks during the publication of the notice of the intention of the board of supervisors to issue the bonds, and this petition must be filed within the three weeks next preceding the meeting of the board, and the petition must contain the words against the issuance of the bonds. If the petition is not filed within the three weeks next preceding the meeting of the board and is not against the issuance of the bonds, the board of supervisors have no jurisdiction over the petition and have no authority to order an election. In other words there are an especial two precedent conditions that must be complied with before the board of supervisors can have any authority to order an election. One of these condi-

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tions is that a petition must be filed during the publication of the notice to issue bonds and this notice must be published for three weeks next preceding the meeting of the board, or three weeks just before the board meets. Such a petition cannot be filed after the board meets, because if it could, it could not be within the three weeks next preceding the meeting of the board. It could not be plausibly contended that such a petition could be filed with the mayor and the board of aldermen after they had met, because the statute plainly says that the filing of the petition must precede the meeting of the board. If such a petition could be filed an hour after the board met, it could be filed a day after they met, or any time during the session if it should last a week, and the last thing before the adjournment of the week's session, such a petition could be filed, and if that could be done it occurs to your writer that it would plainly defeat the purpose, intention and wording of the statute.

The above construction is made clear by Chapter 149, of the Laws of 1910, Section 2 of said chapter. While chapter 149, Laws of 1910, has reference to the issuance of bonds for constructing and maintaining public roads, it can be seen that it has always been the purpose and intention of the legislature, if there should be a petition against the proposed bond issue, that such a petition should precede the meeting at which such board proposes to issue such bonds. The word precede means "to go before in the order of time; to occur first with the relation to anything."

The other precedent condition is that the petition must be against the issuance of the bonds. It would be reading the word "against" out of the statute for this court to hold the petition filed in this case asking for an election sufficient. The board of supervisors would be without jurisdiction to order an election, and it would be folly and a waste of time and money and defeat the very purpose and intention of the legislature for the

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board of supervisors to have the authority to order an election when there was no information in the petition that any one of the petitioners were against the bond issue. The petition in this case asks only for an election, to determine whether or not the voters of the district would approve or reject the bond issue, the petition being "to submit same to the voters of said district, for their approval or rejection," the petitioners knew that this petition was insufficient, and also their lawyer knew that it was insufficient.

As to the question of amending the petition so as to conform to the statute was a controverted fact that the chancellor decided in favor of the appellees. Therefore the right to amend the petition so as to make it read against the bond issue is not necessary to be decided by this court. The record does not show that there was ever a petition of twenty per cent of the adult tax-payers of the district against the issuance of the bond.

I respectfully submit therefore, that there has never been a petition signed by twenty per cent of the adult tax-payers of the Sanford Consolidated School District against the issuance of the fifteen thousand dollar bonds, and that without such a petition it was mandatory on the board of supervisors to issue the bonds, as they had no authority to call for an election. *Purvis et al.* v. *Robinson Tax Collector et al.*, (No. 18239), 69 So. 673.

The able counsel for appellants attacks the constitutionality of chapter 124 of the Laws of 1910, and chapter 255, of the Laws of 1912, and chapter 196, of the Act of 1914, while the case of *Bufkin* v. *Mitchell,* in 63 So. 458, decide that these acts are constitutional. Chapter 180, of the Laws of 1916, the law under which the bonds were issued, is not attacked.

There being no evidence that a single one of the petitioners, the appellants here, are negroes; it would be a needless waste of time to attempt to answer the learned counsel's argument on the race question.

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There was no appeal from the order of the board of supervisors issuing the bonds, and in the case of *Hinton* v. *Perry County,* reported in 84 Miss. 536, on this point this court held.

"It seems that Mr. Hinton was an earnest advocate of removal, and to the point he preferred. No appeal was taken from the action of the board of supervisors; but, after the election and the order of removal, Mr. Hinton filed his bill for, and obtained, an injunction against any further action toward removal. This injunction was dissolved, and three hundrded dollars allowed as damages as attorney's fees, and he appeals. *Robinson, et al.* v. *Board of Supervisors, Itawamba County,* 105 Miss. 90.

Counsel for appellants, on the bottom of page five of his statement of facts and brief, says: "We come next to the most vital point in this case. Did the board of supervisors abuse their discretion, and act within the scope of their authority?" and he relies on the case of *Weston* v. *Hancock County,* 98 Miss. 800, 54 So. 307, and I agree with him that this court held in that case when he says in his brief." This court distinctly held in this case that the tax-payers have until the first Monday to file their petition." But I do not agree with him that this case attempted to hold or held that the petition could be filed on the first Monday after the board, met for business. There is a difference between "on" and "until," and also between "at" and "until." This court in that case among other things did say:

"When the board has published the notice required by section 333 of its intention to issue the bonds of the county for the purpose named in section 331 for three weeks next preceding any meeting of the board, without protest, within that time, of ten per cent, of the adult taxpayers exclusive of those who pay poll tax only, jurisdiction is acquired by the board to issue the bonds at the first meeting or any subsequent meeting

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of the board, as the discretion of the board may dictate and jurisdiction is not lost by the failure to act immediately." "So far as the tax-payer is concerned, when he fails to protest, (within the three weeks of publication next preceding the meeting of the board at which they are to issue the bonds), the bonds then have a potential existence beyond revocation so far as he is concerned." The statement in parentheses is mine.

While the record does not show what per cent of the property in the district is owned by appellants, learned counsel makes the broad statement of fact that they own "practically all of the land in the district, except in the little town composed of saw-mill owners and its employees." The tax rolls and records of the county will show that they do not own two per cent of the property in the district, and although they have children to educate, they will not have to pay two per cent of the taxes to pay for these bonds. These statements are outside the record and will not be noticed by this court.

ETHERIDGE, J., delivered the opinion of the court.

The county school board of Covington county on petition of the qualified electors of the Sanford consolidated school district established a consolidated school known as the Sanford Consolidated School in said county; and there was a petition filed with the board of supervisors signed by a majority of the qualified electors of said district praying for the issuance of fifteen thousand dollars of bonds of the said school district to build and equip a school building for said district, and at the June meeting, 1916, the board of supervisors gave notice of its intention to issue the bonds as prayed for, and the same was published in four issues of the county paper notifying the inhabitants of the district that the board proposed to issue the bonds as prayed for. On the first

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Monday of July a petition in the following words was filed with the board of supervisors:

"To the Honorable Board of Supervisors of Covington County: We, the undersigned, citizens, voters, taxpayers, having learned of your intention to float bonds for the purpose of building and making a certain school located at Sanford in said county, and we being each of us in said Sanford district, do hereby petition your honorable board to submit same to the voters of said district for their approval or rejection."

This petition was signed by more than twenty per cent. of the qualified voters in the said district, many of the names appearing on the original petition appearing also on this petition. On the first Monday of July, before the convening of the board of supervisors, these last-named petitioners held a conference with an attorney and employed him to present the petition on their behalf. The attorney advised the petitioners that the petition was probably insufficient in its verbiage to comply with the law, but suggested that he would try to get it amended before the board and ask all present who were opposed to having it amended to speak out. There was general approval by those present, some thirty-five to fifty citizens, and none of them objected. The petition was filed without amendment on the said Monday and it did not come up before the board of supervisors until Wednesday, July 5th, when the attorney representing the petitioners appeared before the board and asked leave to amend the petition to conform to the statute. There was some discussion of the question by the attorney in favor and by the attorney opposed to this petition, one contending that the amendment could be made, and the other that it could not be made, and the board of supervisors sent for the district attorney of the district, who was then at the courthouse engaged in circuit court, and asked his advice as to whether the amendment could be made, an dwas advised by the district at-

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torney that in his opinion the amendment could not be made. The matter appears to have been dropped, as no motion to allow the amendment was made by any person, and the board adjudged the petition insufficient, and proceeded to issue the bonds as prayed for in the original petition. There was no appeal from the order of the board to the circuit court, then in session, but on the 10th day of July, the appellants, who are petitioners to have the bond issue submitted to an election, filed a bill in the chancery court praying an injunction to restrain the issuance of the bonds making the appellees and others defendants. The bill for injunction alleged unlawful, fraudulent, and illegal acts on the part of the board of supervisors in issuing the bonds. The writ of injunction was granted by the chancellor on the 11th of July, and on the 24th an amended bill was filed, which amended bill was demurred to, demurrer sustained, and another amendment allowed, which amended bill was also demurred to, and demurrer overruled. Thereupon an answer was filed and a motion to dissolve made, and the cause came on for hearing on bill, answer, motion to dissolve, and evidence taken in open court. The chancellor on this hearing dissolved the injunction and dismissed the bill, and the appellants appeal. The bill in this suit attacked not only the proceedings before the board of supervisors, but also attacked the constitutionality of the statute pertaining to consolidated schools on the ground that the statute was unconstitutional: First, because the title of the statute was insufficient; second, because chapter 255, Acts of 1912, amending chapter 124, Acts of 1910, so changed the scope and purpose of the law as to be in conflict with section 60 of the Constitution; and, third, that the order creating the consolidated school did not provide for the maintaining of a colored school, and that there were colored people in the district, some of whom were complainants in the bill opposed to the creation of said school and to the issu-

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ance of said bonds. It was also alleged and proven that after the board created the consolidated school district there was a petition filed with the school board signed by a majority of the electors of the district asking the board to rescind its action, which the school board declined to do. In so far as the constitutionality of the act is concerned, we think that this court settled the constitutionality of the consolidated school law in the case of *Bufkin* v. *Mitchell,* 106 Miss. 253, 63 So. 458, 50 L. R. A. (N. S.) 428. In so far as the attack on the constitutionality of the law because of the title of the act both of 1912 and the 1916 act (Laws 1916, chapter 180), this contention is settled adversely to the appellants in the case of *Lang* v. *Board of Supervisors of Harrison County,* 75 So. 126, and authorities therein cited.

The act is not in conflict with the state or federal Constitution, because under the law the board has the same power to create consolidated schools for the colored race that it has for the white race, and is not analogous to the case of *McFarland* v. *Goins,* 96 Miss. 67, 50 So. 493. In said case the act creating the agricultural high school in 1908 provided in its terms that such school could only be created for members of the white race, and for this reason was a discrimination against the citizens of the colored race who would have to be taxed for the support of a school which they could not attend. Under the present act the board of supervisors and county school board may create consolidated school districts for either the white race, the colored race, or for both according to the necessities of local conditions; and the fact that a district is created for one race alone is not in conflict with any constitutional provision. Our general statutes authorize the school board of establish separate schools for the white and colored races in each county. A consolidated school might be desirable and necessary for one race, while there might be so few

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members of the other race as to make it both unnecessary and undesirable.

A consolidated school district is simply a common school district where two or more existing schools have been consolidated into one single school district.

The bill in this case does not, however, properly present the question, because it is not alleged that there is sufficient colored children to maintain a public school, and, second, it does not allege that there is no colored school located in the territory comprising the district whereat the colored children may be educated in the same subjects taught in the consolidated school. There is therefore no merit in the attack on the constitutionality of the law.

We think the petition presented to the board of supervisors, claimed to be against the issuance of the bonds, is not in fact a petition against the issuance of the bonds. It is merely a petition requesting the board to submit the question of the issuance of bonds to the people for approval or rejection. Any party could sign this petition without committing himself in any way as being for or against the proposed issue. Those in favor of the bond issue might sign this petition is quickly and readily as those against it. Doubtless many names which were appended to this petition would have voted for the bond issue because it appears that they had signed the petition for the bond issue and for the school. Most people are willing to submit questions of this kind to an election and to be governed by the result of the election regardless of their individual views. The board of supervisors' right to order an election at the expense of the taxpayers of the county depends upon the compliance with the law on that subject, and it has no right to hold an election at the expense of the public merely to gratify the wish of the people. It must be made manifest to the board that there are twenty per cent. of the electors who really oppose the issuance of the bonds,

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and this petition did not indicate that twenty per cent. or any other number of citizens were opposed to the bond issue.

We think the board was right in refusing to allow an amendment to the petition after the first Monday in July and in the absence of the petitioners. The petition could not be amended without the consent of the parties who signed it, and it does not appear that twenty per cent. of the qualified electors and taxpayers of the district consented to such amendment.

The judgment of the chancellor is therefore affirmed.

Affirmed.

TURNER v. CRANE.

[75 South. 945, Division A.]

1. ATTACHMENT. *Wrongful Issuance. Evidence. Sufficiency.*

Under the facts set out in its opinion in this case the court held that the court below correctly sustained a perempory instruction for the defendant that the attachment was wrongfully sued out.

2. ATTACHMENT. *Wrongful issuance. Damages. Excessive damages.*

Where on a writ of inquiry to assess the damage sustained by a defendant because of the wrongful suing out of an attachment against a vacant lot, the only testimony relating to any actual damages was that of defendant himself that he had some inquiries to sell the lot, and also some conversation with a gentleman about building a house thereon, but that he was unable to do either, because of the suing out of the attachment and the levy on the lots. These damages were too remote and speculative upon which to base a recovery, but in such case a recovery of attorney fees was correct.

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APPEAL from the circuit court of Scott county.

HON. J. D. CARR, Judge.

Attachment by W. A. Turner against J. J. Crane. From a judgment awarding defendant damages for the wrongful suing out of the attachment, plaintiff appeals.

The facts are fully stated in the opinion of the court.

C. S. Street, for appellant.

A person is a non-resident of this state, within the meaning of the attachment law, if he be out of the state at the time suit is filed, and intend to remain out for an indefinite period, although he may intend to return at some uncertain future day. *Oil Co.* v. *Allen,* 83 Miss. 27.

It has also been held more times than one in this state that domicile and residence are not convertible terms *Bowers* v. *Ross,* 55 Miss. 213; *Brown* v. *Crane,* 69 Miss. 678. So, that, in this case, even conceding for the sake of argument only, that the defendant's domicile was in the state of Mississippi, his actual residence at the time the attachment was sued out, was in Louisiana, and had been for three or four months before and was for three or four months afterward.

There is absolutely no evidence to support a verdict, for eighty dollars, actual damages. The record may be searched from cover to cover and not a line or word of proof will be found of any damages other than a reasonable attorney fee. In the very recent case of *Illinois Central Railroad Co.* v. *Shore,* 74 So. 123, Advance sheets, March 24, 1917, Mr. Justice ETHRIDGE said: "Nothing more than nominal damages is shown in this record, and the jury rendered a verdict for seventy-three dollars and twenty cents in favor of Short. There being no standard by which the jury could legally arrive at this result, the evidence is insufficient to support the verdict."

After the evidence was all in, the court was asked by appellant to instruct the jury that no damages could be

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recovered in this case, except a reasonable attorney fee. The court refused this instruction, and in so doing committed error.

W. C. Eastland, for appellee.

There is quite a difference in an absent debtor and an absconding debtor. The case of *Wallis* v. *Wallace,* 7 M. and 6 Howard, the court held that abscond as used in the statute has been used as equivalent to the term conceal. In 1 Words and Phrases, page 30, we find the following: "A man may be absent, or absent himself, without absconding or intending to elude his creditors. *Conard* v. *Conard,* 17 N. J. Law (2 Harris), 154-156. An absconding debtor, within an act of allowing attachment of goods of an absconding debtor includes a debtor who was shut up in his own house." *Ives* v. *Curtis,* 2 Root (Conn.) 133.

"An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals or withdraws himself from his usual place of residence beyond the reach of process. It is not necessary that he depart from the limits of the state in which he has resided. If one eludes his creditors, he intends to defraud or delay them. If one eludes his creditors, then he can be held to the intent of evading process, and all the law requires in order to constitute an "absconding debtor" is that he shall put himself in such a position that he can, and does, successfully evade the service of process. In one case it may be by concealment in his own house. It may consist in going from place to place so quickly as to evade meeting with the service of process anywhere. *Stafford* v. *Mills,* 32 Atl. 7, 8, 57 N. J. Law, 574."

"A party may abscond and subject himself to the operation of the attachment laws against absconding debtors and still not depart from the limits of the state. *Field* v. *Adron,* 7 Md. 209, 213; *Smith* v. *Johnson,* 62 N. W. 217-

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218, 43 Neb. 754, Citing *Hoggett* v. *Emerson,* 8 Kan. 262; *Ware* v. *Todd,* 1 Ala. 200; *Fitch* v. *Waite,* 5 Conn. 121; *Field* v. *Adreon,* 7 Md. 209; *Malvin* v. *Christolf,* 7 N. W. 8; 54 Iowa, 562, Quoting Bouv. Law Dict.; *Bennett* v. *Avant,* 34 Tenn. (2 Sneed), 153; *Gandy* v. *Jolly,* 52 N. W. 376-377; 24 Neb. 536; *McMorran* v. *Moore,* 71 N. W. 505-506, 113 Mich. 101; *Thompson* v. *Newton,* 2 La. 411-413; *Norman* v. *Zieber,* 3 Or. 197, 205; 1 Bouv. Dict., 3rd Revision page 92; Fitsgerald, 2 Caines, N. Y. 318; *Dudley* v. *Staples,* 15 Johns. (N. Y.), 196; *Dunn* v. *Myers,* 3 Yerg. (Tenn., 414; *Fitch* v. *Waite,* 5 Conn. 117; *House* v. *Hamilton,* 43 Ill. 185; *In re Proctor,* 27 Vt. 118; *Mandel* v. *Peet,* 18 Ark. 236; *Field* v. *Adreon,* 7 Md. 209; *Ross* v. *Clark,* 32 Mo. 296; *Oil Company* v. *Allen,* 83 Miss. ——.

We submit from the facts in this case that there was sufficient evidence for the jury to award appellee actual and punitive damages for the wrongful suing out of this attachment. In 2 R. C. L. pg. 912, in the last section under attachment we find the following: "And the seizure under attachment of exempt property, with knowledge of the exemption, is sufficient to allow the recovery of exemplary damages. Similarly, an affidavit alleging nonresidence, sworn to without inquiry and recklessly and executed by an excessive seizure of property, justifies exemplary damages. Also see 29 L. R. A. (N. S.) 277, note. We respectfully submit that the evidence in this case wholly fails to show and prove that appellee is a non-resident of this state or that he absconds himself as charged in appellant's affidavit; that the facts are undenied and that there was nothing left for the court to do but sustain appellee's motion for a peremptory instruction, and that there was full and sufficient evidence to submit to the jury the question of attorney's fees and damages, and that the case should be affirmed.

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SYKES, J., delivered the opinion of the court.

The appellant, W. A. Turner, instituted an attachment suit against appellee, J. J. Crane, in a justice of the peace court of Scott county. From the judgment in that court an appeal was prosecuted to the circuit court. In the circuit court a peremptory instruction was given the jury to return a verdict in favor of the defendant on the attachment issue and awarding a writ of inquiry to assess the damages sustained by the defendant because of the wrongful suing out of the attachment. The jury returned a verdict in favor of the defendant for eighty dollars actual damages and thirty-five dollars as a reasonable attorney's fee incurred by the defendant in defending the suit. Judgment was entered on this verdict in favor of the defendant for this amount, from which judgment this appeal is prosecuted.

The grounds of the attachment were that the defendant was indebted to plaintiff in the sum of one hundred and seven dollars and forty-six cents, and that the said Crane, defendant, "so absconds himself that he cannot be served with a summons," and that the defendant was a nonresident of the state; that he had assigned or disposed of or was about to assign or dispose of his property or rights in action wih intent to defraud his creditors. The defendant in the court below, the appellee here, was the only witness who testified as to the grounds of attachment. His testimony showed that he was an old man about seventy-six years old and practically an invalid; that a few years before the attachment suit was brought his home in Forest burned; that that he had not rebuilt the same because he was not financially able; that after his home burned, on the advice of his physician, he went to Louisiana and visited a son in one place and a daughter in another place, remaining away several weeks of that year; that in the year the attachment was sued out, on the advice of his

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physician and in search of health, he remained away from Forest about six months visiting these same relatives of his; that he was only away temporarily; that his home was at Forest; that he was a resident and citizen and a voter of that town and county; that he was a Confederate soldier, and was drawing a pension in Scott county; that he was not away from home for the purpose of absconding or absenting himself or to put himself where he could not be served with the process of the courts of that county; that the only property owned by him was the lot upon which his residence had stood.

He further testified that he had had one or two inquiries with reference to selling the lot, and also some talk with a gentleman about building a house on the lot for him, thereby providing a home for himself and his wife. During the time that the appellee was absent from Forest, his wife, who was an invalid suffering with paralysis, remained in Forest all the time.

Upon this testimony the court correctly sustained the peremptory instruction asked by the appellee that the attachment was wrongfully sued out. The testimony beyond dispute shows that appellee was only away from home temporarily in search of health.

There was no testimony to sustain the verdict, however, for eighty dollars as actual damages in addition to the attorney's fee of thirty-five dollars. The only testimony relating to any actual damages was that of the appellee himself that he had had some inquiries to sell the lot, and also some conversation with a gentleman about building a house thereon, but that he was unable to do either, because of the suing out of the attachment and the levy on this lot. These damages were too remote and speculative upon which to base a recovery. The recovery of the attorney's fee, however, was correct.

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The judgment of the lower court will be affirmed, provided the appellee will remit eighty dollars of the amount of the recovery; otherwise it will be reversed, and the cause remanded.

Affirmed conditionally.

ORR v. JACKSON JITNEY CO. ET AL.

[75 South. 945, Division A.]

1. SALES. *Conditional sale. Priority. Judgments. General liens.*
Where a jitney car company was engaged in two separate and distinct lines of business; first, operating automobiles and taxicabs for the carriage of passengers for hire in a city and vicinity; and second, trading in automobile supplies, and acquired a jitney buss and used it in its business of operating automobiles for hire, such bus did not come within the provision of section 4784, Code 1906, making property used in the business liable to creditors if a "business sign" is not displayed and in such case the lien of a judgment creditor must be postponed to the lien of the seller of the bus who sold with a reservation of title.

2. MECHANICS. *Right to lien. Character of work. Personal property. Statute.*
Under section 3075, Code 1906, authorizing a mechanic who does work on personal property to retain it until his work is paid for, where such mechanic goes after and brings a car to his shop so that he might repair it, such service does not come within the provisions of the statute.

APPEAL from the chancery court of Hinds county.

HON. O. B. TAYLOR, Chancellor.

Suit by H. S. Orr against the Jackson Jitney Car Company and another wherein one Dumford intervened. From the judgment rendered, Orr and Dumford appeal.

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The Jackson Jitney Car Company was a corporation chartered by the state, the purposes specified in its charter being "to own and operate automobiles and motorcars for hire, and to conduct a general automobile and taxicab business for the carriage of passengers for hire in the city of Jackson, Mississippi, and territory adjacent thereto." This corporation purchased from H. S. Orr a "Studebaker jitney bus" for the sum of one thousand three hundred dollars, of which five hundred dollars was paid in cash and eight notes of the Jackson Jitney Car Company for one hundred dollars each, payable to Orr, were executed and delivered, evidencing the balance of the purchase money. Each of these notes contains the provision that:

"Title to Studebaker bus No. 442447 for which this note, one of a series of eight is given, to be and remain in vendor's name until this note is fully paid."

One of these notes was paid, and the other seven were not paid. Immediately after the purchase of this bus by the Jackson Jitney Car Company, it executed a deed of trust on the bus and other property to Teat as substituted trustee for Little (who was a stockholder and officer of the Jitney Car Company), to secure five hundred dollars loaned by Little to the Jitney Car Company. Afterwards one Decell obtained a judgment for two hundred and fifty dollars against the Jitney Car Company, and execution was issued and levied upon the bus in controversy. Thereupon Teat, trustee, made claim to the property in behalf of Little, the beneficiary in the deed of trust, and the sheriff delivered the property to the claimants, bond being duly executed. Thereafter this suit was begun by Orr, the object being to enforce his equitable lien arising from the retention of title to the bus by Orr, the seller. At that time three of the seven unpaid notes were past due. After the institution of this suit one Dumford, a mechanic, was permitted to intervene and set up a claim for labor per-

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formed in the repair of the bus during the time same was in possession and operated by the Jitney Car Company, and before the institution of this suit. The court found against the Jitney Car Company, and the claim of Little, beneficiary in the deed of trust, and found in favor of Orr for the amount of the unpaid notes held by him, subject, however, to the claim of the judgment creditor, Decell, for two hundred and fifty dollars, and Dumford, the mechanic, for one hundred and one dollars and eighty-nine cents, which last claim was made superior to all the other claims. Orr appeals, but the Jitney Car Company and Little did not appeal, so the controversy in the supreme court was between Orr as appellant, and Decell, the judgment creditor, and Dumford, the mechanic, as appellees. Appellees claimed that the Jitney Car Company was engaged in the mercantile business as well as in operating cars for transportation of passengers, and that it sold automobiles and automobile parts, and that, being so engaged, it was in the business of a trader, and that the bus in question was acquired in its general course of business, and that Decell, the judgment creditor, without notice of the lien of Orr, had the right to look to the assets of the Jitney Car Company for the enforcement of his judgment, because of the "business sign statute" (section 4784) which provides as follows:

"If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' and 'company, or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action, used or acquired in such business shall, as to the creditors of any such person, be liable

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for his debts, and be in all respects treated in favor of his creditors as his property."

R. H. & J. H. Thompson and *Fulton Thompson,* for appellant.

The first question: Decell's judgment and execution lien. This court has so often adjudged the validity and effectiveness of the retention of title by the seller of personal property as security for the unpaid purchase money that we deem it almost useless to cite authorities on the subject; we will, however call the court's attention to the following of its own decision on the question: *Thomas* v. *Harris,* 1 Smed. & M. 185; *Ketchum* v. *Brennon,* 53 Miss. 607; *Duke* v. *Shackleford,* 56 Miss. 552; *Gaydeh* v. *Tufts,* 68 Miss. 691; *Foundry Co.* v. *Pascagoula Ice Co.,* 72 Miss. 615; *Young* v. *Sallie,* 83 Miss. 362; *Watts* v. *Ainsworth,* 89 Miss. 40, and the following decisions distinctly recognize the doctrine of those affirmatively announcing it. *Journey* v. *Priestly,* 70 Miss. 584; *McKean* v. *Apparatus Co.,* 74 Miss. 119; *Broomfield* v. *Hoover,* 90 Miss. 502.

This court has held, however, that where a seller sells personal property to one whom he authorizes to resell it, and the same is resold, the retention of title by the first seller loses its efficacy. *Columbus Buggy Co.* v. *Turley,* 73 Miss. 529; *Parry Mfg. Co.* v. *Lowenberg,* 88 Miss. 532. In these cases the plaintiffs, the owner of personal property reserved title in themselves but gave possession to another with power to sell the property, and the authorized person sold the same to the defendants, who were without notice of plaintiffs' reserved title. There is no doubt about the correctness of these decisions, because in each case the right to sell to strangers was given by the owner to the party whom he placed in possession, although he reserved title in himself. The point to the Columbus Buggy Company case was the fact that the

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contract conferred a right on the vendee to resell the property; and the distinguishing feature of the Parry Mfg. Company case was that the manufacturing company gave power to Harvey to dispose of the property as the agent of the selling company and the ultimate purchaser in each case had no notice of the reservation of title.

In each case the seller who reserved the title authorized the buyer to sell the property. The express authorization to sell itself precluded the party in whom the title was reserved from afterwards claiming the property when found in the hands of one who had purchased it for value without notice, just as effectually as if the sale had been made by the holder of the legal title himself.

This case presents no such feature. Orr did not in any way authorize the Jitney Company to sell the bus; it was not purchased by the company to be resold and it has never been resold. 2 Freeman on Execution, 335.

The doctrine of *caveat emptor* applies with full vigor to execution sales. Our courts have held that a private sale of personal property by a vendee whose vendor has reserved title in himself as security for the unpaid purchase money is not effective against the reserved title, although the second purchaser was without notice and paid full value for the property. *Ketcham* v. *Brennan*, 53 Miss. 596; *Nugent* v. *Priebatch*, 61 Miss. 402.

The second question; Dunford's claim. The chancery court had no jurisdiction of the claim propounded by Dumford and should not have permitted him to interplead and become a defendant to the suit but we will not argue the question because of section 147 of the Constitution. The decision of this court in the case of *Brown* v. *Dale*, 109 Miss. 52, 67 So. 659, is recognized as authority supporting the legal proposition on which Dunford's demand is based.

The chancery court, however, was too liberal in its rulings in favor of Dumford; his petition or answer to

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the bill and the account thereto attached are insufficient to entitle him to the full relief the chancery court granted him. His answer or petition does not show when he did the work on the jitney bus and but poorly, if at all, identifies the bus upon which the work was done. His petition or answer avers that Dumford did certain work and repairs upon "said jitney bus" but there is no preceding mention of the bus in the pleading.

There are four items in the account aggregating fourteen dollars and twenty-five cents charges for "going after and bringing in the car" presumably from places where it had broken down Dumford had no lien for these items; they did not involve the services of a mechanic; nor was he entitled to a lien under any condition for the bottle of Neat Foots Oil, thirty-five cents, sold by him to the Jitney Company.

The third question has either Decell, the judgment creditor, or Dumford, the mechanic, the right to subject the property to their respective debts because of the business sign statute, Code 1906, 4784.

The pleadings in this case do not present this question and it is by no means certain that the chancery court passed upon it. However, we are advised that in the trial in the court below counsel for appellees insisted that the case fell within the provisions of the statute. It is true that the statute provides:

"If any person shall transact business in his own name," all the property, stock, money and choses in action used or acquired in such business, shall, as to the creditors of any such person, be liable for his debts and be in all respects treated in favor of his creditors as his property."

The jitney bus in question was neither used nor acquired in the mercantile or trading business of the Jitney Company. It was acquired in its business as a common carrier of passengers on the streets of Jackson; it was not acquired for the purpose of being sold, nor did

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Orr have any knowledge at the time he conditionally sold the bus that the Jitney Company was engaged or was about to engage in any other business than that authorized by its charter. There is no proof in the record to show that the bus was ever used in the mercantile or trading business of the jitney company; that it may have been occasionally run into the house in which the Jitney Company was carrying on its business as a trader, if it were a trader, does not render the bus liable to the company's creditors under the sign statute.

It is a complete answer, we submit, to the proposition that this case falls within the business sign statute to say as is the case, that the bus with Orr's consent was neither used nor acquired in the trading business of the Jitney Company, if it had one. *Adams* v. *Berg,* 67 Miss. 234, 7 So. 225; *Longino* v. *Bank,* 76 Miss. 395, 24 So. 901. It was conditionally acquired by the Jitney Company in the course of the business for which the company was chartered, the carriage of passengers along the streets of Jackson and roads in the vicinity. It was never sold to the Jitney Company; it was not a part of its stock in trade, even if it were run into the place of business where the Jitney Company engaged as a trader in other articles. See also *Gayden* v. *Tufts,* 68 Miss. 691, and *Tufts* v. *Stone,* 70 Miss. 54, showing that the business statute ought to receive a sensible construction.

J. A. Teat and *Chalmers Potter,* for appellee.

The only question involved upon the hearing of this cause upon appeal is whether or not the statute of frauds (section 4784) known as the business sign statute, applies. If it does apply, then Mr. H. S. Orr, appellant, has no standing in court.

The first contention of appellant is: "There is no pretense even in the pleadings that the complainant, Orr, had knowledge that the jitney company was engaged in any other business than that for which it ob-

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tained its charter and no pretense whatever that the Jackson Jitney Car Company purchased the automobile bus in question in its mercantile business or with intent and design to sell the same."

All of the business of the Jackson Jitney Car Company should be subject to the payment of the notes of Mr. Orr, for the judgment of Mr. Decell, or for the payment of the mechanic's and materialmen's lien of Mr. Dumford, by what authority or decisions would the sheriff be justified in distinguishing one class of property of the Jackson Jitney Car Company from another when levying his execution. Under section 4784, Miss. Code 1906, the statute uses this comprehensive and clear language.

"All the property, stock, money and choses in action used or acquired in such business, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

It must therefore follow that the distinction sought to be made by appellant cannot be maintained. An opinion of this court to this effect would be destructive of the statute, productive of such litigation and would overrule the long line of decisions which have well settled the scope and interpretation of this very beneficial statute. *Hall* v. *Berg,* 65 Miss. 187; *Merchants & Farmers Bank* v. *Schaaf* (Miss.), 66 So. 402; *Gallaspy* v. *International Harvester Co.,* 67 So. 904.

C. E. Dumford, a mechanic in the city of Jackson, has put in his claim for one hundred and seven dollars as a prior lien on the "jitney bus" question for labor and work done on the said car.

In appellant's brief it is claimed that it does not clearly appear that the work was not done and the repairs made during the time that Dumford was in the employ and was a servant of the Jackson Jitney Car Company. That counsel is entirely wrong in this is shown on page 57 of the record where Dumford swears that all the work

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for which he claimed his lien was done after he left the employment of the Jackson Jitney Car Company.

This case is on all fours with the case of *J. A. Broome & Sons* v. *S. S. Dale & Sons,* 67 So. 659. In that case Dale & Sons sold the automobile in controversy to one Polk for the price of seven hundred and seventy-five dollars and retained title in themselves to the automobile as security for the purchase price. There was still four hundred and sixty-five dollars due them on the car. Broome & Sons knew at all times that the automobile had not been fully paid for by Polk. Broome & Sons, mechanics, did ninety-five dollars and twenty-five cents worth of work on the automobile.

It is contended by counsel for appellant that Dumford is not entitled to pay for four items on the account aggregating fourteen dollars and twenty-five cents charges for going out to bring in the car. Counsel claim that Dumford had no lien for these items as they did not involve the service of a mechanic. Section 3075 of the Code of 1906, reads as follows:

"All carriages, buggies, wagons, plows or any article constructed, manufactured or repaired by any person and at his instance, shall be liable for the price of the labor and material employed in the repairing of the same."

It cannot be contended that it was not necessary labor to go after the automobile after it had broken down and bring it back to repair it, and section 3075 provides, as above stated, that any article repaired shall be liable for the price of the labor employed in repairing it.

All of these contentions, facts and evidence were thoroughly gone into and thrashed out before the chancellor on the trial of this cause and the trial court having found the facts in favor of the claimant, Dumford, the appellant, is therefore accordingly bound by the facts as found by the trial court unless the finding be manifestly wrong. In the case the finding of fact is manifestly correct and

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is supported by the strongest reasoning as well as common sense judgment.

Therefore we respectfully submit that the decree of the chancery court is eminently correct and that the same should be affirmed.

SMITH, C. J., delivered the opinion of the court.

The Jackson Jitney Car Company was engaged in two separate and distinct lines of business: First, operating automobiles and taxicabs for the carriage of passengers for hire in the city of Jackson and vicinity; and, second, trading in automobile supplies. The Jitney bus here in controversy was acquired and used in its business of operating automobiles for hire, and consequently does not come within the provisions of section 4784 of the Code, so that the lien of Decell, the judgment creditor, should have been postponed to that of appellant.

Dumford, the mechanic, has no lien for the charges in his account aggregating fourteen dollars and twenty-five cents for "going after and bringing in the car," so that he might repair it; services of this character not coming within the provisions of section 3075 of the Code, and to that extent the decree in his favor is erroneous.

Reversed, and judgment here in accordance with this opinion.

Reversed.

ABASI BROS. v. LOUISVILLE & N. R. CO. ET AL.

[75 South. 756, Division B.]

TROVER AND CONVERSION. *Custody of replevied property. Delivery to wrong person.*

Where one in whose custody the sheriff has left replevied property, fails to deliver the property on the sheriff's request to the defendant in replevin who had given a replevin bond, but turns the property over to the plaintiff in replevin, such per-

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son is liable to the defendant in replevin, for its conversion irrespective of the merits of the replevin suit, and notwithstanding plaintiff in the replevin suit claimed the property had been stolen and it was required for identification purposes. A judgment in such case will not affect the rights of the parties in the original replevin suit.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Suit by Abasi Bros., against the Louisville & Nashville Railroad Company. From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mize & Mize, for appellant.

White & Ford and *B. E. Eaton,* for appellee.

ETHRIDGE, J., delivered the opinion of the court.

Abasi Bros., the appellants, are junk dealers in the city of Gulfport, Miss., and deilvered to the Louisville & Nashville Railroad Company sixteen barrels of scrap copper, brass, aluminum, and zinc for shipment to Buffalo, N. Y. The goods were received and receipted for by the Louisville & Nashville Railroad Company and started on the journey to Buffalo, N. Y. One W. T. Stewart, connected with the Gulf & Ship Island Railroad Company, and the Gulfport & Mississippi Coast Traction Company, through some arrangement with the officials of the Louisville & Nashville Railroad Company, had this junk returned to Gulfport and consigned to W. T. Stewart, care of Gulf & Ship Island Railroad Company. When this junk reached Gulfport on its return journey, the Gulfport & Mississippi Coast Traction Company sued out a writ of replevin making Abasi Bros., the Louisville & Nashville Railroad Company,

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and W. T. Stewart defendants, claiming that said Gulfport & Mississippi Coast Traction Company was the owner of said property. The sheriff took possession of the property, making the return of seizure of said property, but left it in the custody of the Louisville & Nashville Railroad Company. Abasi Bros., within the time allowed by law, gave bond as required by law for the forthcoming of the property to await and abide by the said judgment of the circuit court in the said replevin suit, and the sheriff phoned to the depot agent of the Louisville & Nashville Railroad Company and informed him that Abasi Bros., had given the bond and that the property seized should be released; but instead of the Louisville & Nashville Railroad Company delivering the property to Abasi Bros., who had given the bond as above stated, the Louisville & Nashville Railroad Company delivered it to the manager of the Gulfport & Mississippi Coast Traction Company, who receipted for it in the name of W. T. Stewart; but W. T. Stewart did not sign the receipt for the goods, and when the Abasi Bros., called for the property in question the Louisville & Nashville Railroad Company refused to give it to them, having delivered it to the Gulfport & Mississippi Coast Traction Company as above stated. Abasi Bros., thereupon filed a suit against the Louisville & Nashville Railroad Company in the circuit court of Harrison county for a conversion of the property delivered to it and for which it had given bond as above stated. The Gulf & Ship Island Railroad Company was also made a defendant to this suit. The Louisville & Nashville Railroad Company defended this suit upon the ground that Abasi Bros., were not the owners of the property and that it had delivered it to the true owners; it being contended that the property was stolen property, having been stolen from the Gulfport & Mississippi Coast Traction Company by divers parties and sold to Abasi Bros.

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Abasi Bros., testified that they bought the property from various parties, and kept a list of the names of the parties; the books containing the names of the several parties and the amounts bought from each being introduced in evidence. For the defendant, the manager and employees of the Gulfport & Mississippi Coast Traction Company testified that the Gulfport & Mississippi Coast Traction Company was the only concern that bought or used aluminum wire in that vicinity, and that a portion of the goods involved in this suit was aluminum wire of the kind and character bought and used by the said Traction Company, and that in the storm in September preceding the filing of the suit its wires were blown down and a lot of it stolen from it. It also introduced evidence that certain of the parties from whom appellant bought wire were convicted of theft, and then proved that many of the names entered on the book were unknown to certain witnesses introduced for the defendant, among whom was a deputy sheriff. At the close of the evidence plaintiffs, Abasi Bros., requested a peremptory instruction as to the liability of the Louisville & Nashville Railroad Company for the property, which was refused by the court. The court granted instruction for the defendant, instructing the jury that, after the sheriff released his levy, he had no further right to control the action of the Louisville & Nashville Railroad Company with reference to the wire, and that if he did undertake so to do the Louisville & Nashville Railroad Company had a perfect right to disregard any instructions which he gave in reference to the further disposition of the wire; also instructed the jury that if they believed from the evidence that the property in question was the property of the Gulfport & Mississippi Coast Traction Company, then the Louisville & Nashville Railroad Company had the right to turn it over to the Gulfport & Mississippi Coast Traction Company, regardless of any instructions from the sheriff, and they

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should find for the defendant; and further instructed that, if the property turned over to the Gulfport & Mississippi Coast Traction Company was the property of said company, plaintiffs cannot recover, even though they might have been innocent purchasers from persons in possession and claiming to be its owners, and that if they believed the property in controversy was the property of the said Traction Company they should find for the defendant.

We believe under the present record the court should have given a peremptory instruction as to the liability of the Louisville & Nashville Railroad Company for the value of the property, and submitted to the jury the question of the value of the property and damages suffered by plaintiffs. This case is different from an ordinary case where goods are consigned to a railroad company for shipment, and are delivered by the railroad company to a party other than the consignee, where the party to whom the goods are delivered is the real owner of the property. In this case the question of the ownership of the property was pending in the circuit court, and the plaintiffs had given bond for the forthcoming of the property, and by reason of giving such bond had the right to receive and hold the property, and had the option of having the property at the trial or in lieu thereof paying such sum as the value thereof as the jury might find the property was worth. There could be no doubt of the right of Abasi Bros., to the possession and control of the property, subject only to satisfying such judgment as might be rendered in the circuit court on this issue. The action of the Louisville & Nashville Railroad Company in turning this property over to the plaintiff in the replevin suit in the manner this record shows it did was nothing less than a deliberate and high-handed disregard and violation of appellants' rights. It may be that the property had been stolen, and it may be that it was very desirable for the

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Traction Company to have possession of the property for the purposes of identification; but these facts did not warrant the Louisville & Nashville Railroad Company in delivering the property to the Traction Company in disregard of the orders of the sheriff and the rights of the plaintiff. It arbitrarily and without any authority whatever delivered this property to the Traction Company, with knowledge of the plaintiffs' rights and in disregard of the law of the land. The Louisville & Nashville Railroad Company must suffer the consequences and pay the value of the property in this suit. It might be that plaintiff in the replevin suit would have recovered, but delivering the property in the manner it was delivered here was not authorized, and amounted to a conversion on the part of the Louisville & Nashville Railroad Company.

The judgment of the court below is reversed, judgment entered here for the plaintiff as to liability of the Louisville & Nashville Railroad Company, and remanded to the court below for the purpose alone of having damages assessed by a jury. This opinion and judgment is not to be held to affect the rights of the parties to the replevin suit, but the trial of that issue may be proceeded with as though this suit had not been filed.

Reversed and remamded.

DOYLE v. L. HERZOG & BROS., DRY GOODS CO.

[75 South. 760, Division B.]

1. USURY. *Excessive interest Statute. Construction.*

Under Code 1906, section 2678, as amended by Laws 1912, chapter 229, providing that "if a greater rate of interest than eight per cent. shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the con-

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tract be executed or executory," a creditor is not penalized merely for demanding a greater rate of interest than eight per cent. where there was no contract to pay a greater rate and no such excessive interest was actually paid.

2. USURY. *Burden of proof.*

Where there was no contract to pay a greater rate of interest than eight per cent., the burden of proof is upon the debtor to show that he actually paid a greater rate.

APPEAL from the circuit court of Washington county. HON. F. E. EVERETT, Judge.

Suit by L. Herzog & Brothers Dry Goods Company, against Robert Doyle. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Chas. W. Crisler and *Jno. Crisler,* for appellant.

This suit is a controversy over interest in the sum of sixty dollars and eighty-five cents on an account for the sale of merchandise. Two errors are assigned: First, the court below erred in rendering a judgment in favor of plaintiff and against defendant for the interest, being the sum of sixty dollars and eighty-five cents; second, the court below erred in rendering a judgment in favor of the plaintiff and against defendant for costs.

As the second assignment stands or falls with the first, we shall confine our observations mainly to the latter, giving to the other only a brief mention in closing.

The defendant, appellant here, seeks to avoid the payment of this interest because of a violation of section 2678 of the Mississippi Code of 1906, as amended by chapter 229 of the Acts of 1912. In the statement of facts, shown on pages 11 and 12 of the record, it is agreed that plaintiff, appellee here, charged, and rendered invoices and accounts to appellant for interest in

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a sum greater than eight per cent. per annum. Chapter 229 of the Acts of 1912 as announced in *Ford* v. *Waterworks Co.*, 102 Miss. 717, embraces two classes of persons who come under the condemnation of the statute: First, those who contract to receive a rate of interest in excess of that allowed by law; and, second, creditors who receive a rate of interest greater than that allowed by law.

The law as now existing was not in force when the case of *Planter's Bank* v. *Snodgrass*, 4 Howard, 573, was decided. The law under which that case was decided being found in the revised Code of Mississippi of 1823, pages 460 and 461. The law then in force did not embrace the second class of persons named, and we are not to be considered as calling into question the soundness of the court's decision in the Planters bank case.

It is agreed in the statement of facts, already referred to that appellant never at any time agreed to pay excessive interest. Hence, we may eliminate from our consideration the first class of cases mentioned in the Water Works case, which restricts the present inquiry to whether appellee's claim comes under the condemnation of the second class.

It is well to note here that it is well settled, by a long line of decisions of this court, that if it is shown that usury existed in any particular the entire contract is tainted, and this we take to be too well established for argument or citation of authorities.

It is admitted that an amount exceeding all interest, and interest charges, still remains unpaid. Did appellee then receive a rate of interest greater than that allowed by law?

That appellee was charging excessive and illegal interest, is admitted; but it will be contended that the payments, in contemplation of the law, were to be applied to the valid part of the demand and not to the illegal portion. Our answer is that appellee did not do this,

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and there is nothing in the record to justify a supposition, or even a suspicion, that he did. Certainly it cannot be maintained that appellee could not have applied the payments to the illegal interest if he so desired. If he then, in point of fact, did so, there is nothing left for the law to contemplate or presume.

In receiving the payments, what was appellee's intention, and in fact, his action regarding their application? Can it be contended for a moment that he intended to apply, or did apply, the payments to the extinguishment of the principal before paying the interest? Such a view would be contrary to universal custom and in direct contradiction to natural law. It would suggest to even the simplest mind the ridiculous spectacle of killing a bird and leaving its tail to fly around in space.

How then, can appellee, in view of his own conduct, be heard to say that he is not guilty of receiving greater interest than the law allows. Moreover, section 2681 of the Mississippi Code of 1906, expressly provides that payments are first to be applied to the interest, and the statute does not specify the nature of the interest, whether legal, contract or excessive.

But we do not admit the soundness of the contention that the law, regardless of what appellee may have done, will apply the payments to the valid part of the demand and not to the illegal portion. In cases of this kind in which the creditor has applied the payments to the illegal items, there would be merit in the contention that the court would, at the instance of the debtor shift the payments and apply them to the legal items. It seems to us elementary that the debtor would have such a right. But we have no such request from them here. Appellant is not asking the court to disturb the application of the payments, and we are confident that the court will not countenance such maneuvers on appellee's part to escape the consequences of his own misconduct.

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It will also be contended that this case does not come within the second class mentioned in the Water Works case for the reason that the debtor cannot sue and recover back the interest illegally paid. The reason is good but the conclusion is wrong. The cause of this is that the right of the creditor to retain the money paid is evolved from the doctrine of setoff, the debtor still being indebted, and not from any lack of application of the principle asserted by appellant.

To hold contrary to appellants view would impose upon a debtor the useless and hazardous burden of paying all of the legal demand and a part of the illegal demand before he could avail himself of the usury statute. Under such a construction, just so the illegal performance was consummated the former debtor could sue and recover back all interest paid; but so long as any part of the transaction remained incomplete he could not avail himself of the defense of usury, though at such a stage it could be done without litigation. Under such a rule, the honest man who would not conceal his intention of availing himself of his creditor's unfairness would find far less favor with the law than the crafty dishonest one, for such a decision would not only encourage litigation, but would furnish a ready incentive to trickery, duplicity, and deception.

Barbour & Henry, for appellee.

The statute under which usury is claimed by appellant is contained in the Laws of 1912, chapter 229, the part relating to this case being as follows: "If a greater rate of interest than eight per cent. per annum shall be stipulated for or received, in any case, all interest shall be forfeited, and may be recovered back, whether the contract is executed or executory."

As stated by appellant, the agreed statement of facts shows that there was no stipulation for excessive in-

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terest, so the only question before the court is whether or not interest above eight per cent. per annum was received.

As this amount on July 1, 1915, was seventy-six dollars and twenty-six cents, and the total of all payments after that date was seventy-five dollars, it is plain that, under any possible interpretation of the statute appellee has not received a sum equal to eight per cent. per annum on its account.

Therefore, in order for appellant to secure a reversal of this case, he must show to the court that the mere presentation of an open account showing an interest charge greater than eight per cent. constitutes usury. The case of *Ford* v. *Waterworks Company,* 102 Miss. 717, decided in 1912, settles this question. The Waterworks Company brought suit for a water bill with interest, and an additional ten per cent., under their rules, for failure to pay within a certain time. The very excellent brief of attorneys in that case showed that the authorities were uniform that the collection of this ten per cent. additional would constitute usury, and the court reversed the case because it had been allowed by the circuit judge, but rendered a judgment for the water bill and legal interest, holding that the mere claim of suit for the additional ten per cent. did not make the appellee guilty of violating the usury laws.

The case of *Puckett* v. *Fore,* 77 Miss. 391, and numerous other cases also settled this question, by holding that payments are applied by the law to the items of the account which are valid, and not to the illegal portion. Therefore, even under this construction, if the seventy-five dollars had been more than interest at eight per cent., the payment would have been applied to the legal part of the account, which would be the principal and legal interest and nothing to the payment of a usurious interest charged, and there could be no usury until the creditor had received payments greater

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than the sum of the principal and eight per cent. interest.

As shown by the agreed statement of facts, there was no usury in the various statements rendered up to July 1, 1915, at which time Mr. Doyle had paid seven hundred and fifty-three dollars and fifty cents on an account of one thousand, twenty-seven dollars and eighty-two cents, including interest, so that, if payments are applied first to the legal interest and then to the principal, he had paid all of the interest in the account except the sum of two dollars and fifty-five cents before any usury was ever claimed. At that time, the balance due was about two hundred and forty dollars and four cents, which included the principl and six per cent. interest, so that, if there is any usury even under their contention, it amounts to only about two dollars and fifty-five cents as the total of interest which the circuit judge allowed which accrued after July 1, 1915, was only this small sum.

If we are correct in our interpretation of the law that payments are applied first to the legal interest and then to the principal, this would be true of all payments made after July 1st, and therefore there could be no usury until the creditor had received payments greater than the total sum of the principal and interest at eight per cent. per annum. Under this view of the case, there could not possibly be any usury, and we think this correctly states the law.

It was Mr. Doyle's contention, however, that the fact that they presented him an account showing an amount greater than eight per cent. as interest made the whole amount usurious, and gave him the right to have all his payments theretofore made applied to the principal of the indebtedness, and narrowed the issue in this case case down to the interest. The first page of this brief, which has figures based upon that proposition, shows that, accepting this horn of the dilemma, and segregat-

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ing all interests as having not been paid at all, the total payments, after the first claim of usury, were for a sum of seventy-five dollars, whereas, the interest involved at eight per cent. for the same length of time was for a sum not less than seventy-five dollars and twenty-six cents and not more than seventy-seven dollars and seventy-two cents, so that, if Mr. Doyle has the right at this late day to deny that he had paid interest, and that all amounts theretofore paid by him should have been on the principal, he has yet failed to show that creditor has received, after usury was claimed, a sufficient sum to cover interest at eight per cent., because the lowest amount, according to the figures on the first page, is seventy-six dollars and twenty-six cents; whereas, the total payment after that time was seventy-five dollars, the surplus in favor of the creditor being one dollar and twenty-six cents.

Wherefore, we say that, under any interpretation of the law, no usury appears in this account.

STEVENS, J., delivered the opinion of the court.

This appeal is a result of a controversy over interest in the sum of sixty dollars and eighty-five cents, claimed to be due appellee by Mr. Doyle, the appellant, and judgment for which the lower court awarded. Appellee company sued appellant for the balance of an open account. The case was tried upon an agreed statement of facts. The agreed statement, among other things, shows:

"That the amount due on the principal is one hundred and six dollars and seventy-four cents;" "that the amount of interest properly due, if any, at six per cent. is sixty dollars and eighty-five cents, and that, if the plaintiff is entitled to the interest, the judgment should be for one hundred and sixty-seven dollars and fifty-nine cents, with interest at six per cent. from November 1,

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1915;" "that the proper interest calculation based on the invoices introduced at the trial in the lower court by Mr. Robt. Doyle at eight per cent. would be eighty-one dollars and ten cents;" "that the amount claimed as interest is for an amount greater than eight per cent.;" "that the total amount of principal and interest at eight per cent. from November 1, 1915, would be one hundred and eighty-seven dollars and eighty-four cents;" "that the defendant never at any time agreed to pay any excessive interest;" "that an account rendered about July 1, 1915, claimed interest at a greater rate than eight per cent."

It further appears from the agreed statement that the defendant tendered a check for one hundred and six dollars and seventy-four cents prior to the institution of any suit, and that the check was refused. The so-called itemized account or statement shows that appellant received merchandise to the value of approximately one thousand dollars and made many partial payments thereon from November 23, 1914, to September, 1915. Appellant invokes section 2678, Code of 1906, as amended by chapter 229, Laws of 1912. That portion of Act of 1912 brought under review is as follows:

"If a greater rate of interest than eight per cent. shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract is executed or executory."

There is here no contention that excessive interest was stipulated for. There was no contract whatever in reference to interest. The only question, then, is whether appellee "received" usurious interest. As we construe the agreed statement, after crediting all partial payments, there is a balance of one hundred and six dollars and seventy-four cents admittedly due on the principal. The circuit court allowed this principal, with six per cent. interest. The action of the trial court, in our opinion, must be affirmed. The agreed statement does

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not affirmatively show that the creditor actually received usurious interest in and as a part of the several partial payments made on the open account, and, if so, how much. On the contrary, the parties agreed that all the principal has not yet been liquidated. The statute, in our judgment, does not penalize the creditor merely for demanding a greater rate of interest than eight per cent., but the test is whether the creditor actually received an unlawful or excessive amount of interest. It will be understood, of course, that what we are here saying has no reference to that portion of the statute forbidding the creditor "stipulating" for excessive interest. If the creditor receives usurious interest in any case, all interest is then forfeited and may be recovered back. We can easily conceive of a case where even on an open account the parties in agreeing upon the application of partial payments might agree that a certain portion of the payments should be applied toward liquidating the interest, and if the portion so applied is excessive, then the statute would be violated.

This case, however, does not present an instance where the parties agreed upon the application of the payments, and the burden of proof is here upon the appellant to show that he has actually paid usurious interest. If the creditor has taken some of the partial payments and attempted to apply them on usurious interest charges, the debtor when sued for any balance has the lawful right to insist upon a proper and legal application of the payments, and if upon proper accounting the payments are applied toward the principal and lawful interest, and there still remains a balance due on the principal, then certainly the statute has not been violated. We can only deal with the facts as presented, or, as in this case, agreed upon. The record before us presents no legal ground of complaint.

Affirmed.

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ALEXANDER ET AL. v. WOODS ET AL.

[75 South. 772, Division A.]

1. JUDGMENTS. *Conclusiveness. Matters not decided. Damages.*
Where a chancellor in dismissing a suit wherein a temporary injunction had been issued, did not pass upon the question of damages, that matter was not *res adjudicata.*

2. INJUNCTION. *Action for wrongful injunction. Dismissal of suit.*
Under Code 1906, section 624, providing that the party claiming damages upon the dissolution of an injunction may have the same determined and decreed by the chancellor, but that nothing contained in such section shall prevent the party from maintaining a suit on the injunction bond if his damages shall not be assessed as provided for in the act. Where a suit in which a temporary injunction had been issued was dismissed, which established the fact that the injunction had been wrongfully sued out, the defendants in such suit were entitled to recover damages on the bond, which they sustained by the issuance of the writ.

3. INJUNCTION. *Dissolution by dismissal of suit.*
The dismissal of a bill in chancery operates as a dissolution of a temporary injunction granted thereunder.

APPEAL from the circuit court of Adams county.
HON. R. E. JACKSON, Judge.

Suit by Bartley Woods and others against John Alexander and others for damages resulting from the wrongful suing out of an injunction. From a judgment for plaintiffs, defendants appeal.

The facts are fully stated in the opinion of the court.

Chas. F. Engle and *Wm. C. Martin,* for appellant.

At the February Term, 1916, appellants had the cause set down for final hearing upon the issue docket on bill and exhibits and answers and exhibits, no testimony having been taken by complainants. Thereupon complainants moved to dismiss their suit, and it was dismissed by

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a decree to that effect which taxed complainants with the cost.

In dismissing their bill as complainants did they at once make themselves liable upon the injunction bound at the suit of appellants. The dismissal of a bill upon which an injunction has been obtained, though made without prejudice operates as a dissolution of the injunction, conclusively establishes that the injunction was wrongfully sued out and entitles the obligees in the bond to sue for its breach. *Yale Bowling* v. *Baum,* 70 Miss. 226. Upon this record appellants as plaintiffs below were undoubtedly entitled to recover on the bond such damages as they could show.

Attorneys' fees incurred in obtaining the dissolution of an injunction constitutes part of the damage sustained and are recoverable on the injunction bond. *Baggett* v. *Beard,* 43 Miss. 120; *Freeman* v. *Board of Supervisors,* 66 Miss. 1.

And on the trial of a suit in the circuit court upon an injunction bond after dissolution of the injunction complainants have a right to prove what a reasonable fee would be and recover it as part of the damages. *Yale* v. *Baum,* 70 Miss. 225.

The fact is that the minds of opposing counsel and the court below became confused at this point, and the court, in giving the peremptory instruction for defendants, undoubtedly thought that appellants had lost their right to sue because they had failed to make and press a motion to dissolve. With notice of damages sustained, before the chancery court in cause 2826. The same false idea seems to have been besetting counsel for defendants below, as will be seen from a careful reading of their obscure motion for a peremptory instruction, found on page 70 of the record. This record shows conclusively that nothing was adjudicated in the chancery court except a matter of the court costs; there was no hearing in that court whatever upon the question of damages. In fact appellees, by dismissing their bill, seems to have

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been trying to get out of that court without any adjudication of damages, as soon as they could. However, that may be there certainly was no such adjudication, and in such case the right to sue at law, as was done here, is a statutory right, secured to litigants by the concluding paragraph of section 624 of the Code of 1906. The lower court, in sustaining the motion for a peremptory, beyond question overlooked the controlling effect of this section 624, as well as the decision, straight to the point, of *Yale* v. *Baum, supra.*

This argument was made to the lower court by opposing counsel that because in the chancery court, they could have adjudicated this matter of damages, therefore, by failing to do it there, that subject became *res adjudicata,* and could not be litigated in the circuit court afterwards. We doubt whether this argument would have had any real force even though the thing had not been settled by statute, but we must confess our surprise that the court acquiesced in the force of such argument when the statute says so plainly: "But nothing herein contained shall prevent the party entitled from maintaining a suit on the injunction bond, if his damages shall not be assessed as herein provided for."

We will not weary the court farther, but will close with the request that this case be reversed and sent back for a new trial.

Ratliff & Kennedy, for appellee.

Our contention is that under this state of facts, the plaintiffs are not entitled to recover any damages on the injunction bond in this suit.

The bond does not relate back and it only provides for the payment of such damages and costs as might be sustained by the wrongful suing out of the injunction.

The only thing done by which either costs or counsel fees were incurred or could have been incurred was in the vain and fruitless appeal to the supreme court and

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this honorable court has decided that they had no right to the appeal; that none would lie in such case, and we, therefore, contend that in no event could the injunction bond be liable for costs and counsel fees incurred in a proceeding, which they had no legal right to take, and as shown by the record, this is in truth everything that was done from which costs of counsel fees could possibly have been incurred.

But if we should be mistaken in this regard, we contend further that the whole matter was *res adjudicata*, because the defendants in the injunction suit had propounded their claim in that suit and it had become a part of the pleadings in that case and under that all questions and issues, which might have been settled and concluded in one suit becomes *res adjudicata*, it seems clear to us that plaintiffs in this case are concluded by their pleadings and their claim for the very damages for which they are suing in this case, having been presented in the injunction suit and in a court which had competent jurisdiction to try and determine the same.

In the case of *Lawson* v. *Shotwell*, 27 Miss. 630, it was held that all that might have been tried in the first suit is concluded by the decree. The chancery court discourages a multiplicity of suits, where a suit is determined, it is an adjudication of all questions which might have been tried in it. See also *Stewart* v. *Stebbins*, 30 Miss. 66.

We are, of course, aware of the statute which gives to the circuit court jurisdiction of suits on a bond of this character, but it has concurrent jurisdiction with the chancery court.

There can be no denial of the fact that the chancery court has jurisdiction to determine the claim propounded in the injunction suit by the plaintiffs in this suit and if no claim had been presented, if the pleadings in the injunction suit had not demanded damages on the injunction bond, they could very properly have waited and brought their suit in the circuit court, but having pro-

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pounded their claim in the injunction suit, it was there a pending issue and they had the right and it was their duty to have it passed upon in that court and failing to do so, they are concluded and it becomes *res adjudicata*. See *Hubbard* v. *Fling*, 58 Miss. 266.

In *Davis* v. *Davis*, 65 Miss. 498, it was held: "The mere fact that a claim might be propounded in a suit does not make it *res adjudicata* if in fact it was not embraced in it." And cites *Hubbard* v. *Fling*.

In the present controversy the record shows that the claim was propounded, not only might have been propounded, but was actually propounded, and pending at the time the suit was dismissed and it was the right and duty of defendants if they intended to insist on their claim to have had it settled there, and not having done so, they became thereby forever concluded. *Trust Company* v. *Fitzpatrick*, 71 Miss. 347; *Barber* v. *Levy*, 73 Miss. 484; *Goodbar* v. *Dunn*, 61 Miss. 627.

And while there is no denial of the contention that the circuit court has jurisdiction of such suits, it is equally true that the chancery court has jurisdiction, and where the claim is presented and pending at the time of the dismissal of the suit, the defendant must then and there press his claim and have it adjudicated or forever thereafter hold his peace, and we insist, therefore that this case was properly decided in the court below and should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellants filed suit in the circuit court against the appellees, based upon an injunction bond given in a suit which has been pending in the chancery court. The appellees in the chancery court had obtained a temporary injunction against appellants for reasons unnecessary to be herein stated. A temporary injunction was granted and a written suggestion of damages which would be asked by the defendants upon the dissolution

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of the injunction had been filed in the chancery court. After some legal proceedings, unnecessary to set out, the case was set down for hearing upon bill and answer, when the same was dismissed at the request of complainants. No action was taken in that court with reference to the suggestion of damages. After the dismissal of the bill in the chancery court this suit was filed. At the conclusion of the testimony in the circuit court a peremptory instruction was given for the defendants.

Two reasons are assigned in this court by the appellees as to why this was proper—the first being, that no damages were sustained by the issuing of the temporary injunction; second, that the dismissal of the case without awarding any damages was *res adjudicata* on the question of damages. The chancellor did not pass upon the question of damages in that court; consequently it is not *res adjudicata.*

That this suit may be maintained at law is settled by section 624, Code of 1906. The dismissal of the bill in the chancery court operated as a dissolution of the injunction and established the fact that it had been wrongfully sued out, and that the appellants here are entitled to recover whatever damages they sustained by the issuing of same. *Yale* v. *Baum,* 70 Miss. 225, 11 So. 879; *Baggett* v. *Beard,* 43 Miss. 120.

Reversed and remanded.

HOLMAN *v.* RICHARDSON.

[76 South. 136, In Banc.]

1. WATERS AND WATER COURSES. *Surface water. Protection. Adjoining owner.*

When adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rain water in a diffused state from the higher to the lower level, the owner

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of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. "One must so use his own as not to unnecessarily injure others."

2. SAME.

Where two methods of disposing of such water are available to the owner of the lower lot, each equally efficaceous and neither requiring an unreasonably greater expense than the other, one of which will damage the adjoining property and the other will not, the latter must be adopted by the owner of the lower lot in fending the water therefrom.

3. SURFACE WATER. *Right of owner of lower adjoining lot.*

The owner of a lower adjoining lot has no right to prevent surface water from crossing her lot in a diffused state by means of a brick wall, causing it to pond on a higher lot, where at no greater expense she can fully protect herself by digging a ditch across her lot to a public drain, and at the same time inflict no damage on the higher lot, though she has the right to maintain such brick wall if she takes reasonable care to prevent the water ponding on the higher lot.

4. WATER AND WATERCOURSES. *Prescription. Drainage. Knowledge of use.*

The owner of a higher lot could not acquire a prescriptible right to collect surface water in underground drains and cast it over and across a lower lot through a ditch to a public drain, where such underground tile drains on the higher lot were unknown to the owner of the lower adjoining lot, and where their existence in the nature of things were not open and notorious.

5. WATER AND WATERCOURSES. *Surface water. Damages.*

Where an underground tile drain on a higher lot did not cause any more water to collect and flow through a ditch upon an adjoining lot, than would have done without such drain, the owner of the lower lot cannot complain of its existence.

ON SUGGESTION OF ERROR FOR FORMER OPINION, see 112 Miss. 921.

APPEAL from the chancery court of Noxubee county. HON. J. F. MCCOOL, Chancellor.

The facts are fully stated in the opinion of the court.

Neville, Stone & Currie, for appellant.

"Surface waters are such as diffuse themselves over the surface of the ground, following no definite course

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or channel, and not gathering into or forming any more defined body of water than a mere bog or marsh." 40 Cyc., page 639.

"Surface water ceases to be such when it empties into and becomes part of a natural stream or lake, but it does not become a watercourse by being gathered into an artificial ditch and led away." 40 Cyc., page 640, and authorities in notes 13, 14 and 15.

"Thus, waters from rain or melting snow, having no banks or channels in the soil, are regarded as surface waters though they constantly and naturally flow in a known direction of course, as in the case of valleys and depressions of an undulating country, through which the waters from rains and snows are accustomed to find their way." 30 Am. & Eng. Enc. Law (2 Ed.), page 324, and authorities cited in footnotes.

"The common law rule with reference to surface waters is, that it is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors, and that accordingly the lower proprietor may take measures necessary for the protection of this property, although the result is to throw the water back upon the land of the adjoining proprietor." 40 Cyc., page 642; 30 Am. & Eng. Enc. Law (2d Ed.), page 330. The common-law rule is in force in Mississippi. *Alcorn* v. *Sadler*, 66 Miss. 221; *Sinai* v. *R. R. Co.*, 77 Miss. 547.

Even in those states which have not adopted the common law, or common enemy doctrine, it has been held that the owner of a city or town lot may obstruct the flow of surface water from adjoining premises. *Reilly* v. *Stephenson*, 128 Am. St. Rep. 805; *Shahan* v. *Brown* (Ala.), 60 So. 891.

This last case of *Shahan* v. *Brown* was recently decided by the supreme court of Alabama, and the opinion was written by Mr. Justice MCLELLAND. We call the court's especial attention to this case.

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"This fact that surface water has for years flowed according to the natural lay of the land from the upper land, does not give a prescriptive right to have such flow continue and deprive the owner of the lower land of the right to obstruct such flow so as to cast back water on the land of the upper owner." 30 Am. & Eng. Enc. Law (2 Ed.), page 334; *Swett* v. *Cutts,* 9 Am. Rep. 276.

"No title by prescription can be acquired in an easement without the acquiesence and knowledge of the owner of the servient tenement." 22 Am. & Eng. Law (2d Ed.), page 1210.

The supreme court of Mississippi, in the case of *Mississippi Mills Co.* v. *Smith,* 69 Miss., 299, held that the right claimed by prescription must be limited by the character and extent of the right exercised during the prescriptive period.

The use of a way over land in order to ripen into a title by prescription, must be under color of right, and the privilege exercised must be such as to expose the party asserting such right of way to an action if he wrongfully exercised such right." *Warren County* v. *Mastronarde,* 76 Miss. 76.

"A hostile, actual, open and notorious, exclusive and continuous occupancy for the statutory period is essential to constitute effective adverse possession." *McCaugh* v. *Young,* 85 Miss. 277.

W. W. Magruder, for appellee.

In many jurisdictions, the courts hold that neither the common-law rule nor the civil-law rule is applicable to existing modern conditions but that the right of a servient proprietor to obstruct a flowage of water from the dominant premises is a right to be exercised only within narrow limitations, depending upon the reasonableness and good faith of such obstruction, the purpose thereof, the lack of injury to the dominant premises and other similar considerations.

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A compilation of the authorities under the two general rules or modification of such rules will be found in 85 Am. State Rep., page 715, in which this state is classified among those states adopting the modification of the two general rules.

We refer the court in this connection to the following authority: *Hunt* v. *Sain,* 54 N. E. 325, in which a mandatory injunction was approved, directing the removal of an obstruction by the servient proprietor. Also see *Nibordy* v. *Murray,* 52 N. E. 325; *Roe* v. *Howard County,* 106 N. W. 587; *Cushing* v. *Pires,* 57 Pac. 572; *Finkbinder* v. *Earnest,* 85 N. W. 1127; *Priest* v. *Maxwell,* 104 N. W. 344; *Montgomery* v. *Locke,* 11 Pac. 874; *Boyd* v. *Conklin,* 20 N. W. 595; *Shane* v. *R. R. Co.,* 36 Am. Rep. 480.

The fundamental principle under the modern authorities is the maxim, "*sic utere tuo ut alienum non laedas.*"

Tested by this salutary principle, the decision of the chancellor in this case will commend itself to all men who seek right and love justice.

In a recent memorandum or rule from Division A. of this court in the pending case, *Maud B. Hicks et al.* v. *G. W. Meek et al.,* reference is made to *Sinai* v. *R. R. Co.,* 71 Miss. 547. In this tentative memorandum, the purpose of which is a request of counsel in the Hicks case for briefs, upon certain suggested points, the court indicates—and assumes, in a conditional way, under the Sinai case that the owner of the servient premises "has the right to obstruct the flow of surface water" from the dominant premises.

Of course, the memorandum is not a judicial decision and does not purport to be. It is only a tentative suggestion and inquiry for additional information as an aid to decision. In this connection, we submit; first, that the Sinai case is no authority for the court's tentative and conditional assumption; second, that in any event, the instant case would be governed by the qualification

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that such obstruction of flowage must be "done reasonably for proper objects and with due care" for appellee's land.

The Sinai case does not appear on casual reading to assume that our courts have adopted the common-law rule that surface water is a common enemy, which every landed proprietor can resist and fight at and upon his premises with every means at his disposal. However, as we have already shown, no such decision from this court has been or can be cited for the common-law rule. The Sinai case, upon the contrary expressly recognizes, as does every other decision of our court, the right to the flowage of surface water onto and across the servient estate.

The only question under consideration is as to the method and manner of regulation for this flowage. This Sinai case deals with nothing else. Under any other theory, it would have been a complete defense to the Railroad Company that Sinai had a lawful right to obstruct and dam out from his premises the flowage of surface water, failing to do which, he became responsible himself for his resultant injury or damage.

Point two: It is the well-settled doctrine of the courts, including this jurisdiction, that an easement or prescriptive right may be created and acquired by the statutory occupancy or user for the required period of time under claim of right. *Ryan* v. *M. V. & S. I. R. R. Co.,* 62 Miss. 162; *Alcorn* v. *Saddler,* 66 Miss. 221.

If there was the slightest degree of uncertainty in this state as to the extent and quality of the prescriptive right in a case such as that at bar, it was conclusively settled by the decision in *Crumbaugh* v. *M. & O. R. R. Co.,* 105 Miss. 485.

"A right to flow water over land may be acquired by prescription. It is stated in Farnham on Water and Water Rights, Vol. 2, sections 558 and 559, that: 'Permitting water to be thrown back upon another's land for

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the prescriptive period will raise the presumption of a grant, unless it is shown to have been done under some other right. . . . The continuous flowage of the upper land is sufficient notice that the use is claimed to be adverse. When the right has been acquired by prescription it is as absolute as any other right. . . . The right may be obtained, whether the obstruction to the flow of the stream is a natural or artificial one—the flowage must be under a claim of right, open, notorious, and adverse to the true owner, and it must be continuous and of such a character as to interfere with the rights of the one against whom it is claimed.'

"The prescriptive period in this state is ten years. In the present case it is proved beyond dispute that the flow of water of the creek in the new or present channel has been for over twenty years. In truth, it is stated that it has continued without interruption, but also it has been adverse, exclusive, open, and notorious. Therefore the easement for the flow of water has become a prescriptive right, acquired by appellee." The existence of Mr. Richardson's tile opening into the head of appellant's ditch to Hale street for at least twelve years before this litigation was instituted is abundantly proven.

In a Louisiana case, *Vincent* v. *Michel,* 26 Am. Dec. 496, the court holds that "servitude of drip" may be acquired by prescription, and furthermore that such alteration of the roof as decreases the servitude is no interruption thereof.

Counsel for appellant in their supplemental brief insist that appellee did not acquire a right to the flowage of water across appellant's premises, because as they claim she did not know of the underground tiling. They cite five cases in support of this contention. In response, we say that the flowage of the water across her garden to Hale street was in no way dependent on such tiling and in any event, the tiling was not concealed but protruded under the fence into the head of the ditch in plain view from appellant's side of the fence.

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The Corbey case upon which appellant relies, 83 Am. Dec. 688, deals with a concealed tile so old that its existence was absolutely unknown. The cases cited in the notes to this decision appear to be of little value, if any, in the consideration of the questions at issue on this appeal, because they are dealing mainly with the question of reserved easements by implication.

Appellant also relies upon *Gray* v. *Cambridge* (Mass.), 2 L. R. A. (N. S.) 976. That case is no authority for their position. It merely holds that for the creation of an easement by prescription, the owner of the fee must know of the adverse user or be chargeable with knowledge. Appellee by his tile at the head of the ditch neither increased or accelerated the flowage of water; but in any event, appellant could not sit by for twelve years with the tile protruding and extending in plain view, directly and immediately into the head of the ditch, and then be permitted to say, "I did not look at it."

The case note under this decision announces it as authority for an alternative proposition. The owner must either (A) know or (B) be chargeable with knowledge. While the multiplication of authority from other states on easement by prescription is of little value in view of the definite holdings in this state, we might refer the court to: *White* v. *Chapin,* 12 Allen (Mass.) 516; *Schnitzius* v. *Bailey,* 48 N. J. Eq. 409; *Leidlein* v. *Meyer,* 95 Mich. 586.

These cases hold that under the common-law rule, the lower proprietor has a right of action within the statutory period, and that if he fails to exercise it, an easement by prescription will be created.

In *Trenton* v. *Rucker,* 34 L. R. A. (N. S.) 569, the Michigan court sustains the right of a municipality, even in an urban case, to discharge surface water in the absence of a sewerage system upon a lot where it has flowed from time immemorial.

In *Earl* v. *De Hart,* 72 Am. Dec. 395, the New Jersey court holds in line with our own court that an easement

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by prescription may be acquired by the adverse user for the statutory period through a ditch, it being immaterial whether it be a natural or an artificial ditch. See *McKinley* v. *Chosen Freeholders,* 28 N. J. Eq. 171; *Shane* v. *Kansas City,* 71 Mo. 237.

Point three: At best, appellant can contend only for a conflict of evidence in this case and that is of no value in this court. It has been uniformly held that the decree of the chancellor on facts should not be reversed unless clearly and manifestly wrong. *Derdeyn* v. *Donovan,* 81 Miss. 696; *Lot* v. *Hull,* 104 Miss. 308.

It can hardly be said that appellant's evidence in this case raises a serious question of fact on the real merits of the controversy and we assert without fear of successful contradiction that the overwhelming weight of the evidence in this case is with the decree of the court below.

SMITH, C. J., delivered the opinion of the court.

Appellant and appellee own and reside upon adjoining lots in the city of Macon, that of appellee bounding appellant's lot on the north and west. The level of appellee's lot is higher than that of appellant's, and there is a large swale or hollow beginning on appellant's premises some distance from and extending down to the line separating the two lots. This swale or hollow is not a natural drain in the sense that by it water is collected in or confined to a well-defined natural channel, but because of it, however, a large volume of water is at times collected at the point where it touches appellant's lot. At this point a ditch, dug many years ago by a gentleman who then owned both lots, conducts the water across appellant's lot to a public drain along the street which bounds appellant's lot on the south. Two or more underground tile drains accelerate the flow of the water from appellee's lot to the head of this ditch across appellant's lot, but discharge no water thereon other than such as

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would be so discharged without them. In addition to the water collected at the head of this ditch water also flows from appellee's lot on and across appellant's lot for practically the entire length of the line dividing them. The volume of water which now flows from appellee's lot across that of appellant's is less than it was when appellee purchased his, because of certain artificial drains, other than those here complained of constructed by him, which conduct a portion of the water in another direction. The flow of this water across appellant's lot is damaging to her, and if it should remain on appellee's lot will damage him. In order to prevent this water from flowing across her lot appellant commenced the erection of a solid brick wall extending the full length of the line separating it from appellee's lot, the effect of which would be to cast the water back upon appellee's lot. A ditch can be dug along the north and west line of appellant's lot at a cost not exceeding that of this brick wall which would conduct the water to the public drain on the south side of appellant's lot, into which the ditch which now crosses her lot flows, by means of which the water would be prevented from damaging either of the parties hereto. After appellant began the erection of this brick wall and before its completion appellee filed his bill in the court below praying that she be enjoined from building and maintaining it. A temporary injunction was granted in accordance with the prayer of the bill, which injunction on final hearing was made perpetual.

Two questions are presented to us by this record: First, to what extent, if any, may appellant obstruct the natural flow of rainwater in a diffused state from appellee's premises over and across her own? Second, what right, if any, has appellee to collect rainwater falling upon his premises by means of artificial drains and discharge it on the premises of appellant?

Any discussion of the rules of the civil and of the ancient common law with reference to the right of one

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landowner to obstruct the flow of surface water from the land of an adjoining owner on and across his and the difference, if any such in fact exists, between the rules of those two systems of law will be of no value here for the reason that the rule with us, as will appear from examination of the cases from this court hereinafter cited, is that when adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rainwater in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. *Railroad Co.* v. *Miller,* 68 Miss. 760, 10 So. 61; *Sinai* v. *Railroad Co.,* 71 Miss. 547, 14 So. 87; *Railroad Co.* v. *Smith,* 72 Miss. 677, 17 So. 78, 27 L. R. A. 762, 48 Am. St. Rep. 579; *Railroad Co.* v. *Davis,* 73 Miss. 678, 19 So. 487, 32 L. R. A. 262, 55 Am. St. Rep. 562; *Railroad Co.* v. *Paine,* 19 So. 199; *Railroad Co.* v. *Wilbourn,* 74 Miss. 284, 21 So. 1; *Railroad Co.* v. *Daniels,* 108 Miss. 68, 66 So. 324. That the rule applied in these cases above announced was so understood by Mr. Freeman will appear from the note to *Mizell* v. *McGowan,* 85 Am. St. Rep. 724. This rule, which also prevails in several other states (3 Farnam on Waters, section 890, p. 2616, and authorities there cited), is based upon and is simply a concrete application of the maxim that, "One must so use his own as to not unnecessarily injure others."

A corollary to this rule necessarily is, that where two methods of disposing of such water are available to the owner of the lower lot, each equally efficacious and neither requiring an unreasonably greater expense than the other, one of which will damage the adjoining property and the other will not, the latter must be adopted by the owner of the lower lot in fending the water therefrom. The decision in *Sinai* v. *Railroad Co., supra,* turned upon this express proposition, as was pointed out in *Railroad Co.* v. *Davis,* 73 Miss. 678, 19 So. 487, 32 L. R.

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A. 262, 55 Am. St. Rep. 562, wherein the court, in approving the holding in that case, said:

"A company having a right to construct its railroad may not, in regard of the rights of adjoining proprietors, so construct its roadbed as to destroy the value of the lands of third persons, even though the injury be occasioned by turning back surface water upon such lands, if, with due regard to the duty it owes to the public, and in the reasonable use of its own property, and at no undue expense, it can, by putting in trestles, culverts, or other openings, provide a way through which such water may safely be allowed to escape."

It is true that in the cases wherein this court has heretofore dealt with this question the offending party was a railroad company, but there can be no distinction in this regard between the rights and duties of such a company and of an individual as pointed out in 3 Farnam on Waters, section 904, except, as set forth in *Railroad Co.* v. *Davis, supra,* such as may be caused by the fact that since a railroad company is authorized by law to construct its embankment, it may not be liable at all for damages which necessarily result to an adjoining landowner from a proper construction thereof, and, we may add further, except such difference as may be caused by the provision of section 17 of our present Constitution, that "private property shall not be . . . damaged for public use, except on due compensation being first made to the owner or owners thereof," which section, however, had no influence on those decisions.

Applying this rule in the case at bar, it necessarily follows that the appellant is without right to prevent this surface water from crossing her land in a diffused state by means of a brick wall, thereby causing it to pond on appellee's land, for she can at no greater expense fully protect herself by digging a ditch across the north and down the west boundary of her lot to the public drain hereinbefore referred to and at the same time

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inflict no damage upon appellee. Appellant, of course, has the right to erect and maintain this brick wall, but in so doing she must exercise reasonable care to prevent the water being thereby caused to pond on appellee's lot to his damage.

Coming now to the second question. Appellee's claim is that he has acquired the right by prescription to collect this water in the underground tile drains complained of and cast it over and across appellant's land through the ditch extending from the end of the swale or hillside hollow to the public drain on the opposite side of her lot. It is unnecessary for us to determine whether or not such a right may be acquired by prescription, for the reason, if no other, that the existence of these underground tile drains was unknown to appellant until about three years before the beginning of this litigation, and their existence in the very nature of the thing was not open and notorious.

It appears, however, from the evidence that the conformation of the surface of appellee's lot is such that the underground tile drains complained of do not cause any more water to collect at the head of and flow through the ditch across appellant's lot than would so do without them, and it does not appear that they accelerate the flow of the water to such an extent as to thereby damage appellant more than she would be without them, from which it necessarily follows that she has no ground of complaint because of their existence.

The decree of the court below having taken a much broader scope than is warranted by the foregoing views was erroneous, so that we committed no error in reversing it, but the cause should have been remanded instead of judgment final being entered here. Our former judgment, therefore, will be set aside, the decree of the court below will be reversed, and the cause remanded. The former opinion herein rendered will be withdrawn.

Reversed and remanded.

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STEVENS, J. (specially concurring). I agree in the result reached by the court, that is, the order reversing and remanding the cause. I do not concur in the reason of the majority in the opinion this day delivered on the suggestion of error. I agree with Judge COOK in the interpretation which he has placed upon previous decisions of this court, and, in the main, I agree with the views expressed in his concurring opinion. It is perfectly manifest to me that the process of reasoning in the majority opinion completely changes the law of waters in Mississippi and substitutes a rule that has never before been recognized in this state. I think the court should at least declare in express language that previous holdings of our court are overruled.

Much importance is given by the court to the maxim that one must so use him own as not unnecessarily to injure another's. This might be termed the "golden rule" which the law applies to the every day affairs of men. I fully recognize this broad principle of justice, but the principle is erroneously applied in the instant case. As applied to the present case it is made to say that Mrs. Holman, as the owner of the lower estate, must receive and at her own expense dispose of the surface water flowing from the upper estate, simply and solely because she, at a reasonable expense, can drain off or dispose of these surface waters. The record shows conclusively that Mr. Richardson, as the owner of the upper estate, can ditch and drain off his own surface waters at a reasonable expense. The majority say that the obligation must be borne by Mrs. Holman, the owner of the lower estate. I say that the obligation is the primary obligation of Mr. Richardson, the owner of the upper estate. I fail to see the justice of permitting a well-to-do landlord to install a system of underground tiling and by means thereof to concentrate at one point and project surface water upon the humble garden spot of a helpless widow. Yet this is the very action which the

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court now approves. It would not be so bad if Mr. Richardson did not have a system of underground tiling. In that case the surface water would be diffused over a larger area and would run onto the premises of Mrs. Holman in a manner less calculated to do so much damage. As it is, the proof shows that the surface waters from the large premises of Mr. Richardson are collected into one large pipe and through the mouth of this pipe projected into a ditch leading through Mrs. Holman's premises. The result of this is that the garden of appellant is frequently overflowed to the extent that a large part thereof cannot be utilized. Mrs. Holman then is the one who is "unnecessarily injured" under the maxim applied by the majority. I have always been taught that a landowner has complete dominion over his own so long as he does not unnecessarily injure another. Mrs. Holman has done nothing to injure Mr. Richardson's premises. She is simply arranging her own premises so that they may be utilized. What she does is in the interest of good husbandry. There is no complaint, that she does not take care of her own surface water. The sole complaint is that she ought to take care not only of her own surface water, but of the surface water which falls upon Mr. Richardson's estate. She then is having a double burden imposed upon her, while Mr. Richardson escapes all burden whatever. This manifectly reverses the rule heretofore existing in Mississippi. If Mr. Richardson could not possibly provide ditches and drains for his own land, the case might be different. It is not, however, an instance where the upper tenant cannot possibly take care of his own excess surface water without imposing upon the lower estate. He can provide his own drainage and that across his own land. This, in equity and good conscience, he ought to do. Our court made an exception in the application of the law against railroad companies. The reason for this was clearly announced by our court in the Sinai

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Case. The very charter rights of railroad companies empower them to appropriate a narrow strip of country across large stretches of agricultural lands and to construct thereon miles of embankments. which necessarily obstruct natural drainage. Of course, the present case does not fall within the exception. The majority opinion declares that:

"The owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot."

There is little consolation in this statement of the court when it is followed by the express holding that the lower tenant must pay the expense. Of course, the lower tenant can always fend off the water by appropriating his own land for necessary ditches and paying all the expense himself. If this is a natural right it is a very costly one.

There is neither claim nor showing that the curb or wall being constructed by Mrs. Holman is a "spite wall." Her attempt to improve her property should be encouraged.

COOK, J. (dissenting). As I have always considered and still consider the settled law to be in this state, the opinion of the court in this case has destroyed the rule. Judge CAMPBELL, speaking for this court in *Alcorn* v. *Sadler,* 66 Miss. 229, 5 So. 695, had this to say:

"He may arrest its flow over his land and divert it before it gets to rest in the reservoir or lake or whatever the body of water may be called, but after it loses its casual and vagrant character as surface water diffused over his land, and reaches the place of rest and becomes a body or collection of water, owned chiefly by another, he cannot lawfully drain it and destroy what belongs to that other in order to clear of water that part of his own land covered by it."

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The last pronouncement of this court upon the Mississippi rule was made one year ago in *Harvey* v. *Railroad Co.*, 111 Miss. 838, 72 So. 274, in these words:

"By the recognized law of this state surface water may be appropriated to his own use by the landowner, or he may expel it from his land. 'Surface water is regarded as a common enemy, which every proprietor may fight or get rid of as best he may; but a landowner has no right to rid his land of surface water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor.' Gould on Waters (3 Ed.), sec. 271."

The opinion of the court cites several cases decided by this court to support its decision, which I will briefly review. The first case cited is *Railroad Co.* v. *Miller*, 68 Miss. 760, 10 So. 61. In passing it will be noted that the court in the case cited expressly approves the rule announced in *Harvey* v. *Railroad Co.*, *supra*, but aside from the fact that this case involved the diversion of natural water courses, the gist of the decision may be found in this paragraph:

"The defendant has, for the protection of its roadbed, dug a ditch along its eastern line, into which is collected surface water, falling upon adjacent lands for a half mile along the ditch, and which but for the ditch would have flowed upon lands of other persons, and has discharged the water thus accumulated upon the lands of the plaintiff, which were free from the flow of the water in its natural course. Upon all the authorities this is an unlawful act, and for it the plaintiff is entitled to recover."

It is difficult to find in the case just discussed any authority for the holding of the majority in the present case. The next case cited by the court is *Sinai* v. *Railroad Co.*, 71 Miss. 547, 14 So. 87. Judge WOODS, after stating the facts, opens his opinion with these words:

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"The question presented is resolvable by the application of common-law principles to new and changed conditions. At the ancient common law every landowner fought and fenced against surface water as suited his necessities. It was a common enemy, which the landowner dealt with according to his own pleasure, for his own protection. But this strict rule had its origin when the soil was used for agricultural purposes. In that primeval day of the law's birth and growth, a railway corporation . . . was undreamed of."

So it was in that case the court wisely, I think, modified the rule to fit unforeseen and undreamed-of conditions. It was an adjustment of the law to a "new order of society." This case left undisputed the general rule—the common-law rule which had theretofore been applied to the known conditions. But the court applies to this case the maxim that each person must so use his own property as not to do unnecessary harm to another.

In the present case we have nothing new; the situation here is the same everywhere in the rolling lands of the state, and the effect of the decision is to totally destroy the rule—to make the lower estate the servient estate. In other words, the maxim is made much more potent than the rule of law heretofore recognized by the courts of this state, and if the decision of the court is to be the law, the civil law with regard to surface waters will hereafter prevail, for it is difficult to imagine a case wherein to fight surface water would not be denied, upon the theory of injury to the upper proprietor. I confess, in the light of the ruling of this court in the present case, that I have never understood the Sinai Case. The court, in that case, as I have always understood, was undertaking to uphold the common-law rule with such limitations as the unique conditions manifestly demanded. It will be noted, however, that the railroad company was held liable in that case, but not the appellee in this case, who did a similar act;

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that is to say, he has maintained his right to dump the surface water flowing from and over his lands onto the lower lands, and the lower owner is enjoined from making a fight against the enemy. Stated differently, in the Sinai Case the railroad company was held liable for misusing the surface waters, and the appellee here is accorded the right and power to prevent the appellant from raising her hand in defense clearly because her land is somewhat lower than the dominant estate—a reversal of the rule heretofore applied in this state. In the present case Mrs. Holman is required, by the decree of this court, to bear the expense of taking care of the surface water flowing over and off Mr. Richardson's lot, while it would not cost Richardson any more to do so than it will cost Mrs. Holman.

This decree can only be defended upon the civil law theory that the upper estate is the dominant estate and the lower estate is the servient estate; a reversal of the Mississippi rule, as I understand it. The next case cited by the court for its opinion is *Railroad Co.* v. *Smith*, 72 Miss. 677, 17 So. 78, 27 L. R. A. 762, 48 Am. St. Rep. 579. This is another railroad case, and deals with flowing streams and the overflow waters of same, and, this being true, it has no application to the present case for the reasons mentioned above. But the Smith Case needs no interpretation, and we will quote from the opinion therein a statement of the conditions then under consideration, viz.:

In *Sinai* v. *Railroad Co., supra,* we declared that the supposed rule of the common law, under which it was there claimed that each proprietor had the absolute right of excluding surface water from his premises, regardless of any injury to an adjoining proprietor, could not be invoked (if it in fact existed) by a railroad company asserting a right to submerge hundreds of acres of adjoining land with surface water by its embankment. It is apparent that a rule intended to regulate the correlative rights of adjoining landowners whose property

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is devoted to agriculture or residence purposes could not be applied to the same extent, either in favor or against a railroad company owning a strip of land one hundred feet wide and hundreds of miles long."

Again, the majority opinion cites *Railroad Co.* v. *Davis,* 73 Miss. 678, 19 So. 487, 32 L. R. A. 262, 55 Am. St. Rep. 562. I do not think this case has the remotest application to the present case. It was held in that case that the company had presumably paid for all damages flowing from the proper construction of the road, in the eminent domain proceedings, and that the company was under no duty to so construct its roadbed as to provide against all except unprecedented overflows. *The Daniels Case,* 108 Miss. 68, 66 So. 324, did not involve the questions here discussed, and this manifestly appears from a reading of the opinion, and this is true of *Railroad Co.* v. *Paine,* 19 So. 199.

Having discussed all the cases cited in the majority opinion, and believing that not one of these cases afford any authority for the holding of the court, I will add a word about the case decided. The court has stated the case most favorably for Mr. Richardson, not more so than the evidence offered by him warrants, and in my opinion the statement does not entitle him to the relief accorded him.

Having the utmost respect for the learning and ability of the members of the court concurring in the opinion, I nevertheless believe that they have entirely misconceived the principles announced in the cases relied on. These were all railroad cases, and in all of them this court was at pains to explain that they were exceptional cases and called for a modified rule; an equitable and just rule to meet modern conditions. Of course, there was no thought of applying one rule to a railroad corporation and a different rule to private persons similarly situated, for the obvious reason that private persons, unless they engage in the business of building and operating commercial railroads, can never find themselves in

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the same situation. The railroad cases are in a class to themselves, because they bring about conditions unlike other classes of landowners.

I concur in the judgment of the court reversing the decree of the chancellor, but dissent from the rules of law announced in the opinion.

This change in the common law of the state is a legislative function, and if I correctly interpret the rules of law controlling this case, the court has assumed the role of legislators, which, in my opinion, is always dangerous, and in this case of doubtful wisdom, to put it mildly.

PITTS v. STATE.

[76 South. 140, Division B.]

1. LARCENY. *Sufficency of evidence.*
A conviction of grand larceny will be reversed on appeal where the indictment charged the larceny of three yearlings and a cow, described merely by the owner's name, and where the testimony showed that the cow did not belong to the party as charged in the indictment and the jury might well have found that the yearlings were worth less than twenty-five dollars, there being no direction to the jury to find for the defendant as to the cow and no direction as to finding the value of the yearlings separate from the cow.

2. SAME.
In such case the defendant could not plead former jeopardy as to the theft of the cows as there was no such description of the cow as could identify her when you take from the description the fact that she was owned by the person alleged to be the owner in the indictment.

APPEAL from the circuit court of Calhoun county.

HON. J. L. BATES, Judge.

Jesse Pitts was convicted of grand larceny and appeals.

The facts are fully stated in the opinion of the court.

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C. E. Inman, for appellant.

The counsel for the defendant earnestly insists that this cause should be dismissed against defendant appellant because of variance between the proof and the indictment, the indictment charging ownership to be in one Spearman and the proof conclusively showing ownership was in Spearman jointly with others (page 34 of the record in this cause, third page of the testimony of D. E. Spearman), and the appellant defendant relies upon the law as laid down in *McDowell* v. *State,* 8 So. 508.

Frank Roberson, for the state.

Another contention made by appellant is that there is a variance between indictment and the proof as to the ownership of the property alleged to have been stolen. The owner of the cattle testified that he had given the cow to his daughter and son-in-law, but that the rest of the cattle belonged to him. There is ample testimony in the record to show that the value of the cattle which belonged to Mr. Spearman exceeded twenty-five dollars in value.

The facts of this case are overwhelming as to defendant's guilt and I submit that the case should be affirmed. It seems that defendant is peculiarly fortunate in that this record has been delayed a year and a half reaching this court and in the meantime he has been out on bond.

ETHRIDGE, J., delivered the opinion of the court.

The appellant was indicted in the circuit court of Calhoun county at the September term, 1915, for the larceny of "three certain yearlings and one certain cow, a more particular and accurate description of which is to the grand jury unknown, then and there the personal property of D. E. Spearman of the value of fifty dollars," etc. On the trial of the cause the proof on the

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part of the state developed the fact that the cow in question was not the property of D. E. Spearman, but was the property of his son-in-law. There was no direction to the jury to find for the defendant as to the cow, and no direction as to finding the value of the yearlings in question separate from the cow. The proof in the case on the value of the cattle as a whole varied considerably, there being several witnesses who testified that the value of the whole bunch of cattle alleged to have been stolen was not exceeding thirty-five dollars or forty dollars. It appears from the testimony of the prosecuting witness that the cow was much more valuable than the yearlings, and if the cow had been eliminated from the case and the jury instructed to find for the value of the yearlings separately, it is probable that the jury would have found their value to be less than twenty-five dollars, and consequently petit larceny instead of grand larceny. In addition to this the defendant could not plead former jeopardy as to the theft of the cow, as there is no such description of the cow as could identify her when you take from the description the fact that she was owned by the person alleged to be the owner in the indictment. If this part of the description is taken from the indictment it could not stand. It follows that the case should be reversed and remanded for a new trial, so that the cow may be eliminated from consideration by the jury.

Reversed and remanded.

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ROMANO v. STATE.

[76 South. 141, Division B.]

INTOXICATING LIQUORS. *Illegal possession. Evidence. Sufficency.*

A conviction of the illegal possession of liquors could not be sustained under the Laws of 1916, chapter 103, where the agreed statement of facts showed that an officer went to defendant's store and there caught a small boy carrying out a package containg unlawful quantities of liquor, which had been given him by a third party in the store other than the defendant and it was not shown that such third party had any connection with the store or with the defendant, or that defendant had any connection with the liquor.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Vincent Romano was convicted of having possession of an unlawful quantity of intoxicating liquors and appeals.

The facts are fully stated in the opinion of the court.

Henry & Canizaro, for appellant.

Frank Roberson, Assistant Attorney-General, for the state.

STEVENS, J., delivered the opinion of the court.

Appellant was indicted and convicted for a violation of chapter 103, Laws of 1916, commonly known as the "quart" law, or the "Weakley" law. The indictment charged that the defendant "did unlawfully have in his possession at one time three one-half (3 one-half) pints of whisky and one one-half (½) of gin, the same being in different containers and being spirituous or intoxicating liquor." There was an agreed statement of facts, as follows:

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"It is agreed by the district attorney and the counsel for the defendant, Messrs. Henry & Canizaro, that the following facts is the evidence and proof in this case. That the officers of the law went to the place of business of Vincent Romano, the defendant, for the purpose of making a raid and in search of malt, vinous, spirituous, intoxicating and alcoholic liquors; that as the officers approached the said place of business, that a small negro boy, about fourteen years old ran into the store, and when the officers went into the store or place of business of the defendant, that Mr. Vincent Guido, who was in the store, went up to the front door and called back the negro boy and handed him a package; that thereupon one of the deputy sheriffs called the negro boy back to the store, and found that the package handed him, the negro boy, by Mr. Guido, contained three half pints of whisky and one-half pint of gin; that thereupon, Mr. Vincent Romano was arrested and indicted for violating the Weakley law. The defendant runs a grocery store in the city of Vicksburg, and denies that he had the whisky and gin in his possession or had any knowledge about it; that Mr. Guido who gave the negro boy the package containing the whisky and gin was a friend and visitor of Mr. Romano. On the above agreed statement of facts the defendant made a motion for peremptory instruction, which motion the court overruled, and the defendant excepted."

There was a demurrer to the indictment. The demurrer was overruled, and the defendant duly excepted to the ruling of the court. In prosecuting this appeal, counsel for appellant assign as errors: First, the action of the trial court in overruling the demurrer; and, secondly, the refusal of the court to grant a peremptory instruction discharging the defendant.

Certain constitutional questions are discussed by counsel, but it is so manifest that the agreed facts do not make out a case that we prefer to waive all other questions, and simply to hold that no crime is shown to

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have been committed by the defendant. The agreement itself acquits the defendant. Possibly the verdict of the jury should have been the oft-spoken one of "guilty, but not proven." If the facts had been developed by the introduction of the witnesses themselves, the defendant, the landlord, and operator of the grocery store might have been shown to have had some connection with the transaction. Under the language of the agreed statement of facts, however, it affirmatively appears that Mr. Guido, who handed the negro boy the package of liquors "was a friend and visitor" of the defendant, and, by necessary inference, Mr. Guido was in the store temporarily on a mission of his own. It is not shown that Mr. Guido had ever been a clerk or employee in the grocery store of defendant, or that, upon the occasion testified to, he had any rights in the business, or that he even had the permission of Mr. Romano to come into the store with the package of liquors. Neither Mr. Guido nor the negro boy is here indicted for violation of the law in question. We are not called upon to construe the statute until the liberty of some one depends upon it.

That the position of the court in the opinion here rendered may not be misunderstood, we call attention to the fact that, according to the proof, the defendant had nothing whatever to do with the liquor in question, and that we are not to be understood as holding that the proprietor of a store may convert his shop into a dumping place for the delivery of intoxicating liquors in violation of the statute.

The judgment of the trial court will be reversed, and judgment entered here, discharging appellant.

Reversed.

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MARTIN v. LITTLE.

[76 South. 142, Division B.]

HIGHWAYS. *Taxation. Statute.*

Chapter 177, Laws 1916, authorizing highway taxation if a county board of supervisors should elect to proceed under it, is independent of the last 11 sections of the Code, chapter on "Roads, Ferries and Bridges," and is not limited by Code 1906, section 4469, limiting taxation to three mills on the dollar, since such limitation relates to another and entirely distinct method of highway taxation.

APPEAL from the chancery court of Smith county.

HON. D. M. RUSSEL, Chancellor.

Bill by J. M. Little against G. M. Martin, Sheriff. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

S. V. Little and *R. C. Russel,* for appellant.

Sidney L. McLaurin and *R. S. Tullos,* for appellee.

ETHRIDGE, J., delivered the opinion of the court.

J. M. Little, the appellee, who was a citizen and taxpayer of district three of Smith county, Miss., filed a bill in the chancery court of said county against the sheriff and tax collector seeking an injunction against the sheriff to restrain him from collecting an eight mill road tax on two thousand four hundred and ninety dollars worth of property owned by the complainant in said district and county, said tax amounting to nineteen dollars and ninety-two cents. He alleges in the bill that the board of supervisors entered an order on their minutes adopting chapter 177 of the Laws of 1916 as a road law for district No. 3 of Smith county, and that they levied an *ad valorem* road tax of eight mills on the dollar in said

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district for the purpose of paying for the working of the roads under that system, and that the sheriff by virtue of said order was attempting to collect said road tax. It is further alleged that the said chapter 177, Laws of 1916, does not fix the limit of the *ad valorem* road tax that the board may levy, but claims that said act is supplemental to section 4469 of the Code of 1906, and that in that section the board is limited to three mills on the dollar for road purposes. It is further alleged that, if chapter 177 is not supplemental to and controlled by the limitations in the Code chapter (section 4469), said chapter 177 would be unconstitutional and void. He further alleges that a levy of eight mills is unreasonable and void, and that the limit that the board could levy was three mills on the dollar. The sheriff demurred to the bill, the demurrer was overruled, defendant declined to plead further, and final decree was entered restraining the sheriff from collecting five mills of the eight mills levied, and from this judgment the sheriff appeals here.

The first question we will notice is whether or not chapter 177 is independent of the last 11 sections of the Code chapter on "Roads, Ferries, and Bridges," or whether section 4469 is a limitation on the tax authorized under chapter 177, Laws of 1916. Under the chapter on Roads, Ferries, and Bridges there are two separate road contract schemes, and in addition to this the old system of working under the overseer system. Section 4469 provides for a road tax not to exceed three mills on the dollar. This system of road working was brought forward from the Laws of 1900 and begins with section 4465, and the concluding section 4475 of this system provides that the foregoing eleven sections shall not apply in any county in the state except by order of the board of supervisors to that effect duly entered on their minutes. Another system is contained in said chapter, beginning at section 4441 of the Code, and in section 4443, under this system, it is provided the board

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shall have power to levy an *ad valorem* tax not to exceed one mill on the dollar. Under the chapter on Boards of Supervisors, beginning at section 365, another system of road working is provided and in section 368, under this system, it is provided that the board may levy a special tax upon all taxable property in the county not to exceed one mill on the dollar. So the Code contains three separate systems of taxing to pay for roadwork, and it is difficult to see why section 4469 would apply any more than section 4443 or section 368. Section 85 of the Constitution provides that the legislature shall enact laws for the working of county roads by contract or by convicts, but that the law shall not be effective in any county unless the board of supervisors of the county shall elect by an order entered on its minutes to adopt such law. In the case of *Ellis* v. *Donnell, Sheriff*, 112 Miss. 129, 72 So. 878, this court, speaking through Justice STEVENS, held that chapter 177 of the Laws of 1916 was a separate road district. To use his language:

"It furnishes an entirely separate and distinct method from that provided by the Code sections in question."

It is manifest from this opinion as well as from section 85 of the Constitution that the Code sections did not impose a limitation on the taxing power granted in chapter 177. A similar law was construed by the court in the case of *Lang* v. *Board of Supervisors of Harrison County*, 75 So. 126, in which opinion the court used the following language:

"If the act is to be regarded as an additional method independent of other methods, as it seems to us it must be, then it follows that its own terms are to govern unless there is some general statute broad enough in its terms to make a contrary conclusion mandatory."

The legislature in chapter 177 in section 2 provides as follows: "The board of supervisors may raise funds for the working and constructing of public roads and building bridges by a commutation tax of three dollars

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on all persons subject to road duty in such county or district, to be collected as herein provided, by an *ad valorem* tax on the assessed valuation of real and personal property of such county or district, by an acreage tax or by a bond issue not to exceed five per centum of the assessed valuation of the real and personal property of such county," etc.

Unless the limitation "not to exceed five per centum" be construed as a limitation on the power of the board to levy this tax, there is no limitation in this chapter. Chapter 85 of the Laws of 1916 is the general law on the limitation of the power of the board of supervisors to levy tax and from this limitation roads, courthouses, county common schools, and agricultural high schools are excepted. There is therefore no limitation in this chapter on the power of the board of supervisors to levy taxes, and a careful search of the Constitution fails to disclose any section in the Constitution which imposes a limit on the power of the county to tax at all. The legislature has granted the power to tax to the board of supervisors in chapter 177 without restriction at least under five per cent. and the levy involved here does not approximate this limit. If there is any power in the courts to limit the board of supervisors in their powers and duties of levying taxes for lawful purposes, it does not arise in this case, and would not arise unless the tax levied was manifestly in excess of the needs for lawful purposes, and we will not decide that question until it is properly presented for decision.

It follows from what we have said that the judgment of the court below was erroneous, and it is hereby reversed, and judgment here dismissing the bill.

Reversed and dismissed.

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WALKER BROS. *v.* NIX.

[76 South. 143, Division B.]

1. PARTNERSHIP. *Denial. Verification of pleadings.*
Under section 1975, Code 1906, so providing, plaintiff need not prove the partnership of defendants, where their plea denying it was not sworn to.

2. MASTER AND SERVANT. *Injury to servant. Contributory negligence.*
The fact that a minor employee was watching a boiler, which was in danger of exploding, while he was guiding a log against a saw which injured his hand, was not contributory negligence on his part.

3. MASTER AND SERVANT. *Injury to servant. Negligence.*
A saw mill owner was negligent in failing to furnish an employee a safe place to work, where the mill operated a boiler which momentarily threatened to explode, in close proximity to such employee while employed in guiding logs against a running saw.

4. DAMAGES. *Inadequate.*
A verdict for two hundred dollars for the loss of three fingers by a minor while working in a sawmill was inadequate to compensate him for the injury sustained.

APPEAL from the circuit court of Clarke county.

HON. W. W. VENABLE, Judge.

Suit by T. H. Nix, by next friend against Walker Bros. From a verdict for plaintiff both parties appeal.

The facts are fully stated in the opinion of the court.

J. A. Anderson, for appellant.

We think the court erred in refusing instruction No. 1, asked for on the part of the defendants. The testimony is overwhelming that there was no partnership between defendants at the time of plaintiff's employment, and at the time he was hurt the testimony shows that the mill was operated solely by G. E. Walker.

The testimony of plaintiff himself shows that his own negligence was the cause of the injury. (See his cross-

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examination.) He said he was looking at the boiler at the time of the injury and not his work and that this was the reason he got hurt.

Other testimony of the case shows that plaintiff's job was on the ramp rolling logs, and that on the morning he was hurt at his suggestion he swapped jobs with John Cook. He told John Cook he was asleep when he got hurt. He told Jack Cook that it was his own carelessness that he got hurt and that he was asleep at the time.

The preponderance of the testimony shows that the missing dog was not necessary, nor, was it necessary for plaintiff to put his hand on the log. Plaintiff told J. L. Williams that it was his own fault he got hurt; that he was sitting up there asleep. J. D. Gibson carried plaintiff to Williams' house after he got hurt. Plaintiff said there that he got hurt and that it was his own fault. (See J. D. Gibson's testimony.)

Plaintiff told Earl Williams that he was asleep when he got hurt and that he had been up the night before. He also told Earl Williams that he was the sole cause of it, and that he did not blame the Walker boys a bit. Said he had gotten his money in settlement in this matter. (See testimony of Earl Williams.)

At Williams' house plaintiff said in the presence of J. D. Gibson, Earl Williams, J. L. Williams, and others that he went to sleep on his job and had he been noticing he would not have got hurt. (See testimony of each of these witnesses.)

We think the court erred in admitting the testimony of T. H. and James Nix as to any defect in the boiler. There was no allegation of a defective boiler in the declaration. We think the court erred in admitting the opinion evidence of J. L. and T. H. Nix as to the defective boiler. Plaintiff did not have any right to recover on the ground of a defective boiler. We think the court erred in refusing defendant's instruction No. 1. There was not sufficient proof of a partnership on the part of

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plaintiff, and defendants' testimony conclusively shows that at the time of the injury there was no partnership and that G. W. Walker alone was interested in the mill.

We think that instruction No. 6 should not have been given plaintiff, while there was no plea of assumption of risk in this case still in undertaking the employment plaintiff assumed the risk necessarily incident to his employment. We think this a case where the testimony not only for the defendants but of the plaintiff himself clearly shows that the sole cause of the injury done plaintiff was his own negligence, and the testimony further shows that for any injury he did receive he accepted the sum of forty-five dollars in full settlement for same.

We respectfully submit that this cause should be reversed and remanded for a new trial.

T. G. Fewell and *C. B. Cameron,* for appellee.

The fifth assignment of error is predicated on the granting to plaintiff of the sixth instruction, which instruction is here set forth: "The court charges the jury for the plaintiff that there is no question of assumption of risk in this case." Certainly counsel cannot be in earnest in urging this assignment before this court. The plaintiff was entitled to this instruction inasmuch as there was no plea of assumption of risk filed by the defendants.

Assumption of risk is an affirmative defense and to be availed of, must be pleaded. See 3 Encyc. Pleading and Practice, at page 114. "Assumption of risk—The defense that the plaintiff assumed the risks incident to the employment is also an affirmative defense and should be specially pleaded." Citations under above text: *Louisville R. Co.* v. *Orr,* 84 Ind. 50; *Mayes* v. *Chicago R. Co.,* 63 Iowa, 562; *Nichanbus* v. *Chicago R. Co.,* 90 Iowa, 85; *Walker* v. *McNeil,* 17 Wash. 582; *Oregon Short Line R. Co.* v. *Tracy,* 66 Fed. 931. The above

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has been the rule in Mississippi so long that we need not cite the court any authorities.

Not having pleaded assumption of risk, it was proper for the court to grant the instruction now complained of by appellant. The last assignment of error is based on the court overruling appellant's motion for a new trial.

We submit that a careful reading of this record will disclose no fact which would have authorized the court to set aside the verdict of the jury, except the inadequacy of the damages and there seems to be some doubt as to the power of the lower court to do this. Certainly this can be done and has been repeatedly done by this court under its rules governing cases before this tribunal.

Counsel contends that the record shows that appellee's own negligence was the cause of the injury. We take issue. The record shows abundantly that had the master furnished his servant with a reasonably safe place in which to work, that the servant would not have been injured. That this was his duty is not denied.

As to cross assignment of errors we earnestly and respectfully submit in conclusion that the record shows appellee to have been injured permanently through the negligence of the defendants and that this court should affirm same as to liability and reverse only for proper assessment of damages commensurate with the permanent injury and suffering of plaintiff.

In this connection we cite the court the following case of *Scott* v. *Y. M. V. R. R. Co.*, 103 Miss. 523, where chief Justice SMITH used this language: "The jury having found that appellant's injury was caused by reason of the negligence of appellee, it thereby became its duty to render such a verdict as would fairly compensate him, not only for his actual money lost but also for his suffering and disability.

The verdict rendered, which was the sum of $100 is so grossly inadequate as to indicate that in arriving at

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its verdict, the jury was influenced by passion and prejudice, etc.

Also the case of *Suitberry* v. *Meridian Fertilizer Factory,* reported in 106 Miss. 754, where Judge COOK characterizes the award of two hundred dollars as being less than market price of a good mule."

Surely the loss of a thumb and two fingers from the left hand by a young white man, leaving him a cripple for life, is worth far more than the meager sum awarded by the jury in this case of two hundred dollars.

We respectfully submit that this case should be affirmed as to liability and same reversed for the sole purpose of awarding proper damages in keeping with injury.

ETHRIDGE, J., delivered the opinion of the court.

T. H. Nix, a minor, was employed by the Walker Bros., alleged to be a copartnership and engaged in the operation of a sawmill in Clarke county, Miss., and while so employed was assigned by a member of the said partnership to duties in connection with the sawmill business, and was directed in the course of his employment to hold a log on the carriage while the same was being sawed. It appears that the log carriage of the sawmill had appliances called "dogs," which were fastenings designed to hold the log on the carriage while it was being sawed into lumber. Logs eighteen feet or more in length were fastened with one of these "dogs" at each end, but it was not the custom of the firm to use a "dog" in the middle of the carriage for such purposes, but where the log was under eighteen feet it was only fastened at one end by means of a "dog," and an employee of the company sat on the carriage and held the log with his hands. At the time of the injury the company was operating a boiler in which the inspirator had failed to work satisfactorily, and the water became low, and there was great danger

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apprehended that an explosion might occur, and at the time of the injury the boiler was making a noise, and on account of the apprehension and the noise plaintiff was looking at the boiler, and the log ran on the saw at the place where he was holding and severed three fingers from the hand of the boy, the appellee in this suit.

The defendant pleaded the general issue, and gave special notice under the general issue that it would prove contributory negligence on the part of the plaintiff, and that at the time of the injury the party negligently turned his face away from the saw and was asleep at said time, and that the injury would not have occurred but for contributory negligence. It also filed a special plea of contributory negligence. It filed a plea also that there was no partnership between the Walker Bros. and the business was owned exclusively by G. E. Walker, one of the defendants, but this plea was not sworn to as required by section 1975 of the Code of 1906, and the plaintiff was not required to prove a partnership. It also pleaded in bar of suit a settlement for the injuries complained of for the sum of forty-five dollars. Replication was filed to the plea with reference to the settlement, setting up that the agreement was made while the plaintiff was under twenty-one years of age and voidable, and also that the settlement was not understood, nor agreed, to be in complete settlement of the injury, but was merely to cover the item of doctor's bill and loss of time during the time of the injury. There was a verdict for the plaintiff for two hundred dollars, and from the judgment defendants appeal and plaintiff takes a cross-appeal.

The evidence taken on the trial sustains the allegations of the plaintiff as to his contract and injury, and it appears from all of the testimony that at the time of the injury the plaintiff's attention was attracted to the boiler by reason of the noise it was making, and also that there was general apprehension of all parties pres-

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ent that there would be an explosion of the boiler on account of the low water. We think the evidence shows that plaintiff's attention was attracted away from his duties by reason of the negligent operation of the boiler in its then dangerous condition, which was known to and recognized by all of the parties present, and that the conduct of the plaintiff in this particular does not constitute contributory negligence.

We think also it was manifest negligence on the part of the defendant to operate its saw under the existing conditions, and that it failed to provide a safe place for its servant, this employee, to work, and that on direct appeal there is no cause for reversal, and the judgment on direct appeal is affirmed.

On the cross-appeal we think the verdict was manifestly insufficient, and wholly inadequate to compensate him for the injuries received, and on cross-appeal the judgment is reversed, as to the amount of damages alone, and the cause remanded for a new trial as to the amount of damages only.

Affirmed on direct, and reversed on cross, appeal.

Affirmed, reversed and remanded.

HARRINGTON v. STATE.

[76 South. 143, Division A.]

CRIMINAL LAW. *Documentary evidence. Judicial records.*

Where on a trial in the circuit court for perjury the indictment alleged that the perjury, occurred in a trial of a civil case before a justice of the peace, it was reversible error for the state to fail to introduce as evidence the record of the judgment of the justice of the peace showing the trial had in the justice court, since the trial of a civil case before a justice of the peace cannot be proven by oral testimony but must be shown by the official record of the judgment rendered in the trial in that court, if obtainable.

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APPEAL from the circuit court of Forest county.
HON. PAUL B. JOHNSON, Judge.
E. Harrington was convicted of perjury and appeals.

Currie & Currie, for appellant.

The legal question to which we call the court's attention is: There is no legal proof in the record of the trial in the justice court. The judgment rendered in that court was not introduced. The oral testimony of the justice of the peace, attorney Cook, district-attorney Hall and the other witnesses cannot in law be accepted as proof of the trial. The introduction of the affidavit for the writ of seizure for the books, and the writ itself and the return thereon constitute no legal proof of an actual trial of the case. In this state the justice court is a court of record and its proceedings may be proved, in the first instance, only by its records. The judgment is the primary proof of a trial. In the case at bar no excuse was made or offered for not introducing the judgment rendered in the case.

We stand with firmness upon this proposition, and appeal to the courts to hold the state, the great and powerful state, unflinching in its demand for justice, strictly to the rule here invoked. All the oral testimony offered to establish a trial in a justice court should have been excluded on the motion of the appellant. It was objected to, and finally a motion was made to exclude it. The state was put upon notice and had an opportunity to introduce the judgment, the only competent evidence of the trial. If the judgment had been offered it would have been objected to upon the ground that the justice of the peace had no jurisdiction of either the appellant (defendant) or of the books; the subject-matter of the suit, ad the state fearing this attack upon the judgment did not introduce or offer to introduce it in evidence. But regardless of this or anything else, the state could not prove the trial in justice court otherwise than by the

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introduction of the judgment, unless it had first shown that the judgment had been destroyed, stolen or lost so that it could not be produced. *Whittle* v. *State,* 30 So. 722, settles this question. 3. As matter of law the state did not prove the trial of the case in justice court.

Ross A. Collins, Attorney-General, for the State.

The third question raised by counsel for appellant, that is that the judgment of the justice of the peace court should have been introduced to prove the trial of the case in the justice court and that oral testimony should not have been admitted to prove the fact of this trial, is the only serious question in this case.

This court has held, in *Whitfield* v. *The State,* 76 Miss. 327, 30 So. 722, and in *Davis* v. *The State,* 43 So. 81, that the record in the justice of the peace court should have been introduced. However, in those cases, all the testimony seems to have been oral with reference to the facts in the justice of the peace court, but in the case at bar, the state introduced on the trial in the circuit court the original writ and affidavit, and the original writ of seizure and summons of the defendant requiring his presence before the justice of the peace, on the 3rd day of October, 1916. I submit that this is a sufficient compliance with the rule requiring the best evidence to show the trial in the court where the perjury is alleged to have been committed.

HOLDEN, J., delivered the opinion of the court.

The appellant was convicted of perjury on an indictment charging that he swore falsely and corruptly in the trial of a civil case before a justice of the peace. In the trial of the perjury charge in the circuit court the state failed to introduce as evidence the record of the judgment of the justice of the peace showing the trial had in the justice court. This was error. The

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trial of the civil cause before the justice of the peace cannot be proven by oral testimony, but must be shown by the official record of the judgment rendered in the trial in that court, if obtainable. *Whittle* v. *State,* 79 Miss. 327, 30 So. 722.

There may be merit in the contention of appellant that the court should have instructed the jury that the testimony of two witnesses, or one witness and corroborating circumstances, is required to convict of perjury. *Saucier* v. *State,* 95 Miss. 226, 48 So. 840, 21 Ann. Cas. 1155. But we do not pass upon this question here, as we consider it unnecessary to do so.

The judgment is reversed, and case remanded.

Reversed and remanded.

HINTON ET AL. v. SHEDD, SHERIFF ET AL.

[76 South. 144, Division A.]

JUDGMENTS. *Equitable relief. Correction of errors of other courts.*

A court of equity is without power to correct mere errors alleged to have been made by another court in rendering a judgment in a cause of which it had full jurisdiction. The correction of such errors is committed solely to the supreme court on direct appeal thereto from the judgment or decree complained of.

APPEAL from the chancery court of Lamar county.

HON. D. M. RUSSEL, Chancellor.

Suit for injunction by R. W. Hinton and others against J. C. Shedd, Sheriff of Lamar County and others. From a decree of the chancery court dissolving the injunction obtained by complainants in the court below, complainants appeal.

This is an appeal from a decree of the chancery court dissolving an injunction obtained by the appellants, who were complainants in the court below; the object of said

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suit being to enjoin the enforcement by execution of a judgment obtained by the appellees against appellants.

One Allen sued the Wells Lumber Company in the circuit court of Pearl River county for damages for trespass for cutting pine timber upon his land, and sued out an ancillary attachment against said lumber company on the ground of nonresidence, gave the bond required by law, and writ of attachment was issued directed to the sheriff of Lamar county, where defendant owned property. The sheriff returned said writ to the court, with the indorsement that he had held the attachment intending to levy on certain lumber belonging to defendant, when said defendant tendered a bond in the amount required by law, with Hinton and others as sureties, and that said bond was accepted and approved and no levy made.

Afterwards at the regular term of court in Pearl River county a judgment was rendered in favor of Allen and against the Wells Lumber Company and Hinton and others, sureties on his attachment bond, from which there was no appeal. Execution was issued on this judgment and levied against the property of Hinton and others, sureties on the bond of the lumber company, when they filed this suit to enjoin Shedd, sheriff of Lamar county, and Allen and others, from enforcing said judgment against them, and praying that the judgment be declared null and void. The theory upon which the relief sought is based is that there was no consideration for the execution of the bond for the reason that the sheriff did not levy upon the property of the defendant Wells Lumber Company, but accepted the bond upon which appellants are sureties without making the levy.

W. A. Shipman, for appellant.

Salter & Hathorn, for appellee.

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SMITH, C. J., delivered the opinion of the court.

The validity *vel non* of the bond here in question was for the determination of the court rendering the judgment thereon, the execution of which is here sought to be enjoined, and the objection now urged against the bond, if valid, could have been availed of in that court. Consequently it was not open to review in the court below; for a court of equity is without power to correct mere errors alleged to have been made by another court in rendering a judgment in a cause of which it had full jurisdiction. The correction of such errors is committed solely to this court on direct appeal thereto from the judgment or decree complained of.

Affirmed.

ROBERTSON, REVENUE AGENT, *v.* F. GOODMAN DRY GOODS COMPANY.
SAME *v.* GREENWOOD LUMBER COMPANY.

[76 South. 149, In Banc.]

1. LICENSES. *Trial. State revenue agent. Power to sue.*

Section 4738, Code 1906, empowering the state revenue agent to proceed by suit in the proper court for a past due and unpaid tax, was not designed to authorize the revenue agent to bring such an action in a court of equity and where such action is brought in the chancery court and that court decides to decline jurisdiction in such case section 162 of the Constitution providing that all cases that may be brought in chancery whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court, is mandatory and the chancery court should transfer the cause to the circuit court.

2. APPEAL AND ERROR. *Appealable orders.*

Notwithstanding, section 147 of the Constitution, which provides that no judgment or decree in any chancery court shall be annulled or reversed for want of jurisdiction or from any error

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or mistake as to whether the cause was of equity or common-law jurisdiction, an order of the chancellor sustaining a demurrer to a bill and ordering its transfer to the circuit court is appealable.

APPEAL from the chancery court of Leflore county.
HON. JOE MAY, Chancellor.

Two suits by *Stokes* v. *Robertson* as revenue agent against the F. Goodman Dry Goods Company and Greenwood Lumber Company. From orders sustaining the demurrer to the bills and ordering their transfer to the circuit court, complainant appeals.

The facts are fully stated in the opinion of the court.

Monroe McClurg, for appellant.

The briefs filed in the case of the revenue agent against The Goodman Dry Goods Company cover the contentions involved in this case. It is taken for granted that both cases will be submitted at the same time either on briefs and oral argument, or, as I am willing, on briefs only.

This cause differs from the Goodman case solely in pointed contention that, even where the bill is a pure declaration in chancery, that court under section 4738 of the 1906 Code, ought to take jurisdiction and go right along and determine the case.

Hence, this honorable court is respectfully requested to refer to the briefs in the Goodman case in so far as it covers this case, in disposing of this cause.

Whitting & Osborne, for appellee.

The order sustaining the demurrer in this case is not such an interlocutory order as an appeal is provided for under section 35 of the Code of 1906, for the reason that no possession of property is changed, no money is required to be paid, no expense or delay is avoided (but on the contrary expense and delay are increased); nor are any principles of this cause to be settled. It is ob-

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vious that there can be no contention that this appeal will lie under section 35, unless it is the contention that the principles of the cause are to be settled thereby; and that there are no principles of the cause to be settled by this appeal is clearly settled by the following authorities: *Bierce et al.* v. *Grant,* 91 Miss. 791; *Waterworks* v. *Vicksburg,* 79 Miss. 510; *Delta & Pine Land Co.* v. *Adams,* 48 So. 190; *Clay* v. *Chickasaw,* 63 Miss. 289; *Ward* v. *Whitfield,* 64 Miss. 754; *Railroad Co.* v. *Hopson,* 73 Miss. 772; *Barrier* v. *Kelly,* 81 Miss. 266.

The bill in the case at bar is nothing more or less, in substance and in form than a pure, simple and plain declaration such as would be filed in the circuit court in an action of debt. There is absolutely not a single statement contained in the bill which sets out a ground of equity jurisdiction.

The contentions, upon the strength of which appellant must and does rely, as sustaining his position that the chancery court of Leflore county should have taken jurisdiction of the cause are as follows:

First: That the chancery court of Leflore county, should have taken jurisdiction of this cause in order to avoid a multiplicity of suits and,

Second: That the chancery court of Leflore county should have taken jurisdiction of this cause for the reason that section 4738 of the Code of 1896 expressly authorizes the revenue agent to bring a suit in the chancery court in all cases where back taxes are sought to be recovered, even where as in this case, the action is one for debt, which character of debt is given to such back taxes by section 4256 of the Code of 1906; and this regardless of the lack of allegations giving equitable jurisdiction.

The first contention of appellant that the chancery court should have taken jurisdiction of this case in order to avoid a multiplicity of suits is unsound under a principle of law governing the attaching of jurisdiction by the chancery court on the sole grounds of avoiding a mul

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tiplicity of suits, which principle is firmly established in this state. This principle, which is also practically universally recognized, received a most luminious exposition in the opinion delivered by Judge CAMPBELL in the case of *Tribbett* v. *Railroad Company* hereafter cited; and the reasoning in this case, as well as the conclusion reached therein has been, after some apparently conflicting opinions, finally adopted and approved as the correct doctrine on this subject, obtaining in Mississippi. In the latter opinion rendered by Judge MCLEAN in the case of *Cumberland Tel. Co.* v. *Williamson,* 101 Miss. 1, this doctrine in its entirety, as enunciated in the Tribbett case was, after exhaustive consideration, fully approved and the principle was firmly established that jurisdiction of the chancery court would not attach on the sole ground of avoiding a multiplicity of suits unless each of such suits, was of itself, and itself, alone, such a suit as a court of equity would take jurisdiction of. *Tribbette* v. *Railroad Co.,* 70 Miss. 182.

The second contention of the appellant is that the chancery court should have taken jurisdiction of this case, even though there are no grounds of equitable jurisdiction alleged in the bill, because section 4738 expressly gave jurisdiction to the chancery court in all cases "without reference to equities" assuming, for the sake of argument that the legislature had (quoting from brief of appellant): "the power to confer jurisdiction on the chancery court, and that without reference to equities." It is perfectly obvious from a mere examination of its language, without reference to anything extrinsic, that section 4738 affords absolutely no support for the position that the legislature did thereby invest the revenue agent with the right to bring an action at common law in the chancery court in utter disregard of the lack of equitable grounds. The plain language of the statute is that the revenue agent, "shall have a right of action and may sue, at law, or in equity, in all such cases where the state, counties, municipalities, or levee

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boards have a right of action or may sue." This language is plain, simple and unambiguous, and is susceptible of but one construction, to-wit: that, if the state, county, municipality or levee board could itself bring suit in the chancery court, the revenue agent could bring that same suit in the chancery court; but if the state, county, municapility or levee board could not bring a suit in the chancery court because of lack of equitable grounds, then, the revenue agent could not bring the same suit in the chancery court, and for the same reason. Section 4738 could have no other meaning, and could bear no other construction, and so we say that the court below rightly decided it had no jurisdiction of the case at bar by reason of section 4738; for the court would have no jurisdiction of this suit had it been brought by the state or levee board, and in inevitable sequence, it follows that, under the language quoted from said section, the court had no jurisdiction of this suit brought by the revenue agent.

But in paragraph 2 of counsel's brief he states, regarding court, "it shall transfer all cases brought within it to the circuit court, whereof the circuit court has exclusive jurisdiction, but that constitutional direction is not absolute" and cites many cases to sustain this assertion, as if the assertion, were it sustained thereby, would bolster up his case. We wholly fail to perceive how any of these cases could be conceived to uphold the contention that the chancellor erred in refusing to entertain jurisdiction in transferring this case to the circuit court. Had the demurrer in this cause been overruled and appellee was now in this court as appellant, the aid of these cases could have been invoked by him, with deadly effect, but occupying the position he does, the appellant, in citing these cases, is assuredly "hoist on his own petard," since the writers of these opinions reprobated the action of the various chancellors for doing the very thing appellant says here the court below should have done. With a special note of regret did Judge WOODS

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in the case of *Cazeneuve et al.* v. *Currell,* 70 Miss. 521, lament the inability of the supreme court under section 147 of the Constitution, to make a corrective decision of the error frequently committed by chancellors in assuming jurisdiction of actions purely legal in their nature as distinguished from equitable.

Counsel for appellant is even more unfortunate in invoking the assistance of the case of *Murphy* v. *City of Meridian,* 103 Miss. 110, since that case in construing section 162 of the constitution reverses the action of the lower court in sustaining a demurrer to a bill filed therein, over which the circuit court had exclusive jurisdiction, for the reason that the court failed to do the identical thing which was done by the court below, in the case at bar, viz.: transfer the case from the chancery court to the circuit court upon the sustaining of the demurrer to the bill.

Gardner, McBee & Gardner, for interested parties.

We respectfully submit that an appeal does not lie from such a decree as was rendered in this case. There is no final judgment, nor is there any decree rendered by which the principles of the case on appeal may be determined.

Section 35 of the Mississippi Code of 1906, permits appeals from any interlocutory order whereby money is required to be paid, or the possession of property changed or . . . in order to settle the principles of the cause, or to avoid expense and delay.

No money is required to be paid; the possession of no property is changed; the principles of the case are not settled; and expense and delay is incurred, rather than avoided.

This section has been held to contemplate: "Appeal only in the cases mentioned specifically, or when the principles of the cause are so involved in the rulings made by the chancellor that it will be a gain to all to

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have them promptly passed upon by the appellate court or where an appeal will avoid expense and delay." *Clay County* v. *Chickasaw County*, 63 Miss. 289.

No principle is decided here, but it is held simply that this case should be tried in the circuit court. When this case is heard in the circuit court and judgment final rendered by that court, we submit, that if an appeal is then taken, that, under section 147 of the Constitution of the state of Mississippi, a reversal cannot be had upon the ground that the circuit court was without jurisdiction.

"No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render such judgment or decree." Section 147, Mississippi Code of 1906.

If the state revenue agent, in the circuit court, as his first step move to remand this cause to the chancery court and this motion be overruled, we submit, he cannot complain of this ruling on appeal from the circuit court. If he should desire to question the jurisdiction of the circuit court of Leflore county, he must, we take it, challenge the jurisdiction of that court before proceeding further.

Under the above section of the Constitution, this motion cannot prevail. We submit that surely it cannot be heard to raise this point before the time for raising it, before the circuit court of Leflore county is reached. We submit that the authorities are with us on this proposition: No appeal will lie from an order "allowing appellant to change an equity to a law action and transfer the case to the law docket." 2 Enc. of P. & P. 83; *Gunn* v. *Donaghue*, 113 Ills. 481; 3 Corpus Juris, section 302; *St. Louis, I. M. & S. R. R. Co.* v. *Memphis, D. & G. R. Co.*, 102 Ark. 492, 143 S. W. 107; *Sisk* v. *Bluff City Bank*, 129 S. W. 530; *Gilbert* v. *Shaver*, 91 Ark. 231, 120 S. W. 833; *Womack* v. *Conner*, 74 Ark. 352, 85 S. W. 783; *Mercer* v. *Gree*, 89 Ky. 189, 12 S. W. 194;

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Antonsky v. *City Dye House,* 109 Minn. 96, 123 N. W. 56; *Huffman* v. *Rhodes,* 72 Neb. 78, 100 N. W. 159; *Banayer* v. *Orlandi,* 51 Miss. 663, 101 N. Y. S. 115.

"An order of the circuit court transferring a condemnation proceeding to the chancery court is not appealable." *St. Louis, I. M. & S. R. R. Co.* v. *Memphis, D. & G. R. Co., supra.* While no Mississippi cases are cited in the above note, none can be found to the contrary. In this case, the chancellor holding that there was no equity on the face of the bill, on his own motion transferred this case to the circuit court.

The demurrer in this cause does not ask that the case be transferred, but, "Prays the judgment of the court if he shall make any further answer." The chancellor was required by the law in sustaining such demurrer, of his own motion to transfer the case to the circuit court.

"Under Constitution 1890, section 162, so providing where a case is brought in the chancery court whereof the circuit court has exclusive jurisdiction, the case should not be dismissed, but transferred to the circuit court." *Murphy* v. *City of Meridian,* 103 Miss. 110, 60 So. 48.

What if the circuit court of Leflore county has not exclusive jurisdiction we submit that there is no error in the transfer of this case 28 Cyc. 129. 11 Cyc. 700.

"The question of the jurisdiction of the court depends, so far as regards the nature of the thing in controversy, on the character of the suit." *Boone* v. *Poindexter,* 12 S. & M. 640.

We respectfully submit that this appeal should be dismissed.

STEVENS, J., delivered the opinion of the court.

While there are separate briefs on the part of the appellees in the two cases above styled, both cases were submitted together in the oral arguments, and both involve the same law points. In the Goodman Dry Goods

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Company case the state revenue agent, for the state and the Yazoo-Mississippi Delta levee district, exhibited a bill in the chancery court of LeFlore county alleging that the F. Goodman Dry Goods Company is a mercantile establishment in the city of Greenwood; that on and after the 1st day of May, 1913, 1914, 1915, and 1916, the defendant company operated for each year a retail mercantile establishment with a stock of goods exceeding twenty thousand dollars for each of the years mentioned, and was accordingly liable to both the state and levee district for an annual tax of sixty dollars as a license to do business; that the defendant had procured a license for each of the years mentioned by paying only thirty dollars to the state and thirty dollars to the levee district; that the defendant had exercised the privilege of operating the business on the license granted; that the licenses were procured either by mistake or fraud, in that the defendant was required to make application under oath, and knowingly made a false statement as to the amount of his stock, and represented that the stock would sometimes exceed seven thousand five hundred dollars, but not over ten thousand dollars, in value, whereas, if the written application had stated the facts truthfully, it would have appeared that the stock sometimes exceeded twenty thousand dollars, but never over twenty-five thousand dollars, during the year. It is charged that the license was obtained by paying an insufficient price; that the payment of an insufficient price was equivalent to paying nothing at all, and the prayer of the bill is for the full amount of the license based upon the larger valuation of the stock as charged in the bill. The bill further represents that due notice was given the defendant that it was due the state and levee board each a balance of thirty dollars for each of the years mentioned, and payment was demanded for this balance, but the defendant declined to pay the same. There is an alternative prayer in the bill that, if the court should be of the opinion that the defendant was

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liable for only a balance of thirty dollars per annum, the decree should be accordingly. A general demurrer was interposed to the bill, and upon hearing of the demurrer the chancellor entered a decree reciting that "there is no equity on the face of said bill, and that complainant has a plain and complete remedy at law, and the cause should be transferred to the circuit court," and accordingly sustained the demurrer and embraced in the decree an order transferring the cause to the circuit court in accordance with section 162 of the Constitution.

The bill of complaint exhibited by the revenue agent against the Greenwood Lumber Company charges that the defendant company was a corporation domiciled in the city of Greenwood, where it had been carrying on the business and exercising the privielges of a lumber yard and dealer in lumber continuously from the 1st day of May, 1911, to and including the 1st day of May, 1917, and as such dealer in lumber had an annual sale of lumber from May to May exceeding one-half million feet, and by virtue of the statute became and was liable to pay a privilege license annually in the sum of one hundred dollars to the state and an equal amount to the levee district. It is charged that the defendant conducted business without paying any privilege whatever, and the prayer of the bill is for a personal decree for double the amount of the annual tax for the use of the state and the tax plus ten per cent. for the use of the levee district. The only difference between the two bills of complaint, so far as jurisdiction is concerned, is that the bill against Goodman Dry Goods Company charges that the defendant procured an annual license either by mistake or by fraud, whereas the bill against the Greenwood Lumber Company admittedly presents purely an action for the recovery of a debt. In each case the demurrer to the bill was sustained, and the cause ordered transferred to the circuit court.

Counsel for appellant frankly admits that the main purpose of this appeal is to test the right of the state

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revenue agent to choose his forum. It is further contended that the chancellor erred in refusing to take jurisdiction of the bill against the F. Goodman Dry Goods Company because of the charges of fraud therein. But, while the bill in this case in general language "prays for all necessary commissioners and interlocutory orders and decrees," it does not show the necessity for an accounting, or for the appointment of a commissioner or master, or for the award of any other well-recognized equitable relief. The only decree the chancellor could render on final hearing in event he should entertain jurisdiction would be a decree adjudging that the defendant pay a fixed amount of money, a simple monetary judgment. It is frankly conceded by learned counsel for appellant that the bill against the Greenwood Lumber Company "is a pure declaration in chancery." It is contended in both cases, however, that the chancery court should have assumed jurisdiction under section 4738, Code of 1906, which provides that the state revenue agent "may sue at law or in equity."

Inasmuch as the statute relied on should be read as a whole, we here give it in full:

"The state revenue agent may appoint a sufficient number of deputies. He shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies, associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures, for all past due obligations and indebtedness of any character whatever owing to the state or any county, municipality or levee board, and for damages growing out of the violation of any contract with the state or any county, municipality, or levee board, and shall have a right of action and may sue at law or in equity in all such cases where the state or any county, municipality or levee board has the right of action or may sue. And in all cases of valuation or ownership of property which has escaped taxation, may

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have subpœnaed witnesses to testify before the board of supervisors, board of mayor and aldermen or levee board."

Counsel argue that the present statute was designed to increase or enlarge the powers conferred on the revenue agent by section 4190, Code of 1892, and that now the revenue agent may choose his forum "as he may find the pulse of the locality;" that in those counties in which the people look upon the revenue agent as belonging to "publicans and sinners" this official should be allowed to enter the friendly doors of a court of equity, and in those communities where the jurors are in sympathy with the demands of the agent he should have the right of trial by jury. It is contended that our statute confers concurrent jurisdiction on both the chancery and circuit courts, and that the revenue agent can sue in either court. Section 162 of the Constitution provides:

"All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court."

The case of *Murphy* v. *Meridian*, 103 Miss. 110, 60 So. 48, held expressly that this section of the Constitution is mandatory. The court by COOK, J., said:

"The complainant by his bill makes a case wherein the circuit court has exclusive jurisdiction; and, when the chancery court decided to decline jurisdiction, section 162 is mandatory, and the chancery court should have transferred the cause to the circuit court for trial."

So it is that, if the bills of complaint here under review state purely a common-law action, and section 4738 of the Code was not designed to authorize the revenue agent to bring such an action in a court of equity, the chancellor was eminently correct when he sustained the demurrers and ordered the causes to be transferred to the proper forum. In our opinion, section 4738 is not susceptible of the construction which appellant at-

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tempts to place upon it. It expressly provides that the revenue agent "shall have power and it shall be his duty to proceed by suit in the proper court." It is true that the statute as written in the Code of 1892 did not contain the language that the revenue agent "shall have a right of action and may sue at law or in equity." This is the language which counsel for appellant insists should be interpreted literally. We believe we are aided in construing this language by remembering the history of the statute. Prior to the adoption of the Code of 1892 taxes were not a debt, and the remedy for the collection thereof was by distress. When our statute authorized the revenue agent to sue for back taxes, his right to sue in chancery in proper cases was challenged, even though the case presented grounds for equitable relief. The case of *Revenue Agent* v. *Stonewall Mills,* 80 Miss. 94, 31 So. 544, is an illustration. In that case there was a general demurrer to the bill because, among other things, "there is no equity on the face of the bill." Our court by WHITFIELD, Chief Justice, said:

"If the facts thus alleged are true, it must be obvious that a plain case for equity jurisdiction, on more grounds than one, has been shown, and no amount of subtle and refined reasoning can obscure the right of the complainant to an answer on the facts."

Manifestly the statute as now written was intended to authorize, and indeed to make it the duty of, the revenue agent to sue for back taxes and it authorizes him to file this suit "in the proper court." In seeking recovery, if it is necessary to have an accounting, discovery, or the aid of any other well-recognized remedy in chancery, the proper forum is a court of equity, and to this end the statute expressly authorizes the revenue agent to sue in equity in all proper cases. But certainly, if the statute presents purely a common-law action for the recovery of a debt, the circuit court is the proper court. Certainly the legislature did not intend

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to make of the state revenue agent a favored suitor or to abolish all distincton between equity and common-law jurisdiction. The demurrer was properly sustained, and the action of the chancellor not only in sustaining the demurrer, but in ordering the cases transferred to the circuit court, must be approved.

Counsel for the appellees have challenged the right of appellant to any appeal in these cases. We confess that the question whether the appeals should be dismissed presents a more troubling question than those presented by the merits of the case. On the right of any appeal whatever several points are made. Section 147 of the Constitution is invoked, and it is contended that by virtue of this section we are powerless to reverse the chancellor for merely declining to assume jurisdiction. The appellant admits that the jurisdiction of the chancery and circuit courts in these cases is at least concurrent; and, taking up this admission, appellees contend that, if the jurisdiction is concurrent, appellant yet has his day in the circuit court, the merits of the case have not been decided, and there is no ground for complaint. There is controversy also as to whether the decrees appealed from are interlocutory or final. The determination of appellant's right of appeal is not without difficulty. We believe, however, that the court is justified in assuming jurisdiction of the present appeal. While we conceive it to be the duty of the circuit court to proceed without question with a cause transferred to it by proper decree of the chancery court, it yet remains that the chancellor might in some instances be in error in transferring a cause that manifestly presents grounds for equitable relief, and that could not be tried in a common-law court, according to right and justice. We, of course, recognize that such instances would be very rare indeed, and in the present case the chancellor was correct in declining jurisdiction, and no error can be done the appellant by having these causes transferred. A case, however, might be presented where the com-

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plainant would be compelled to have a reformation of a written instrument, a discovery, an accounting, or some other remedy in chancery before his rights could be ascertained and justice executed. In such cases the very right of the complainant would depend upon his remedy, and among other rights of litigants they sometimes have the right to equitable remedies, without which their very rights could not be enforced or wrongs done them redressed. If a case of which equity has original jurisdiction should be wrongful transferred by the chancellor to the circuit court, and an appeal prosecuted by permission of the chancellor, we would be bound to hold that the substantial rights of the litigants are presented. If we should decline jurisdiction in the present case, we would be setting a precedent whereby jurisdiction would be declined in all cases of this character. The conclusions we reach do not brings the provisions of the Constitution in conflict one with the other. In the present instance the chancellor on sustaining the demurrers expressly granted an appeal to settle the principles of the case and to avoid expense and delay. We accordingly hold that the court has jurisdiction of this appeal. The decrees of the learned chancery court will be affirmed, and the causes remanded to be transferred to the circuit court in accordanc with the decree of the court and the statute regulating the procedure in such cases.

Affirmed and remanded.

ETHRIDGE, J. (dissenting). I am unable to concur with the majority in the construction placed on section 4738 of the Code with reference to the right of the state revenue agent to sue in the chancery court. Under section 4190 of the Code of 1892, which did not contain the provision of the present statute, "and shall have a right of action and may sue at law or in equity in all such cases," the supreme court held that the revenue agent had a right to sue in the chancery court in a case presenting equitable features, although there was nothing more

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than the language in the former statute and the present statute, "he shall have power and it shall be his duty to proceed by suit in the proper court against all officers," etc. With this construction placed upon the former statute giving the revenue agent the right to sue in equity in cases presenting equitable features, it is difficult to reason out why the legislature would put in the present clause "and shall have a right of action and may sue at law or in equity in all such cases," etc., if the only purpose of adding this section was to create the right he already had. I think the legislature should be treated as an intelligent body of men who understand the use of language, and that effect should be given to the language used by the legislature, and we should attribute to the legislature a definite purpose when we consider any change they have inserted in a statute which did not exist in a statute before. To one understanding the history of the revenue litigation in this state and the vast number of suits necessary to be brought to enforce the state's right to collect its revenues it is difficult to see how we could escape the conclusion that it was the deliberate purpose of the legislature to give the revenue agent power to proceed in either court in all cases where the state could bring suit. In counties having large cities and large business interests and where tax dodgers frequently fail to pay proper tax or license, it was necessary to sue large numbers of people, and of course each person had to be sued separately. If all these suits had to be brought in the circuit court and each tried separately before a separate jury with all the expense and delay of a jury trial, it would be practically impossible to collect delinquent revenues and other obligations. In many places large numbers of suits were filed in the circuit court, and as the circuit court is in most counties only held two terms per year, and these terms were limited to short periods of time, and as the court could not impanel juries and try cases in vacation, it was necessary to devise some

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means to bring these causes to trial, or else let the delinquent escape his just obligations to the state. The revenue agent is nothing more nor less than the representative of the state. He is not collecting these revenues for his individual use, but is collecting for the state and counties, and is in reality the state itself in court, because the state can only sue through some personal representative: In addition to this it often develops after a suit has been filed that some relief like discovery or an accounting develops that did not exist, or was not known when the bill was filed, and in such case the action in law would be delayed until proceedings could be had in equity in aid of the law court. In addition to all this in certain counties there are strong influences banded together for the purpose of thwarting, hindering, or defeating the state in its action, because where large numbers of persons were sued separately they generally brought all the influence they could bear to prejudice the public mind against the suits of the state revenue agent, and in disputed questions of fact were often enabled by means of local influences and jury control to defeat the state of its rights altogether. There is no reason why the legislatuure should not confer jurisdiction on the chancery court, but there is strong reason why it should do so. In the chancery court the evidence may be taken in vacation, and the causes may, by consent, be tried in vacation, and by reason of the advantages of the chancery court the litigation could be brought to a speedy termination. I do not think the court should thwart the efforts of the legislature in creating such agency and procedure as it may find necessary to take care of the state's business. There have been many statutory jurisdictions conferred on the chancery court not named in the Constitution, and the legislature has the power to pass such statutes as it desires giving concurrent jurisdiction to the court. When the Constitution uses the language, "all causes that may be brought in the chancery court whereof the circuit court

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has exclusive jurisdiction, shall be transferred to the circuit court," it means, of course, that where a cause has been brought in the chancery court where the chancery court has no jurisdiction conferred by the Constitution or by statute that it should be transferred to the circuit court, which, of course, would have jurisdiction where the chancery court did not have it, but this section does not prevent the legislature from conferring on the chancery court such jurisdiction concurrent with the circuit court as it may deem advisable or expedient, and does not mean that the chancery court shall transfer to the circuit court for trial a jurisdiction which, under the law, it may entertain and try. In case the law has vested jurisdiction in the chancery court it should proceed to try the cause, and not send it to the other court. The question involved here was discussed by this court in the case of *Delta & Pine Land Co.* v. *Adams,* 93 Miss. 341 and 359, and 48 So. 190, 194, where WHITFIELD, C. J., used the following language:

"It is also said by learned counsel for appellant that the language in section 4256 that these taxes, treated as debts, may be recovered by 'action,' because of the use of the word 'action,' excludes the right to proceed in the chancery court. The law has armed the revenue agent, and armed him properly, with the amplest and fullest authority to sue in either a court of law or equity under Code of 1906, sections 4738, 4742, and 4743. If it be said that the only right to bring this action is to be found in this particular section 4256, the answer is that, whilst that is perfectly true, the construction which would make the word 'action' relate to the circuit court alone is palpably too narrow. What possible reason could be assigned for a purpose, on the part of the legislature, to restrict the revenue agent to a court of law for the recovery of taxes treated as a debt, in all cases, universally? Nothing is easier than to conceive of cases so complicated in their facts, and presenting so many difficulties as to the collection of taxes, as that the machinery of the court of chancery alone is elastic enough

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to deal effectively with the situation. . . . It would have been exceedingly easy for the legislature to have said, if they had so meant, that the remedy should be pursued alone in the circuit court. The legislature has not said so, all reason is against such a view, and the word 'action' must be so construed as to work out what appears clearly to have been the purpose of the legislature; and we hold, accordingly, that it empowers suit in either court."

The third syllabus to this case is as follows:

"3. Taxes—Back Taxes—Code 1906, section 4256—Debt—Remedy—Action.—Code 1906, section 4256, providing that every lawful tax levied by the state, a county, or municipality is a debt due by the person owning the property and may be recovered by action: (a) Creates an additional and more effective remedy by which the nature of the tax obligation is changed to that of a debt; and (b) applies as well to back taxes as to current ones, since the statutory method (Code 1906, section 4740) for collecting back taxes is not exclusive; and (c) the use of the word 'action' in the section does not confine the remedy to courts of law, since other statutes (Code 1906, sections 4738, 4742, 4743) give the revenue agent authority to sue at law or in equity; but (d) the section creates a new obligation to pay as well as a new remedy, can have no retroactive effect, and a personal decree in a suit thereunder cannot be rendered for back taxes due before its adoption, although assessed thereafter, since they were not debts but merely taxes."

It is of the utmost importance to the state, as well as to the interests of the honest taxpayer, that all persons bear their just proportion of the burdens of taxation, and no obstacle should be thrown in the way of the state through its proper agent to enforce the discharge of these common obligations upon which the government must depend for its support.

I concur in the proposition that the court has jurisdiction to decide this appeal.

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AETNA INSURANCE CO. v. PELHAM ET AL.

[76 South. 153, Division B.]

INSURANCE. *Consent to appraisement. Effect.*

Where the owner obtained a policy of fire insurance covering her residence and household furniture with a mortgage clause covering the residence and there was no dispute that there was a total loss of the furniture, but there being some dispute that there was a total loss of the residence the owner and the company's agent had an appraisement made, she agreeing to settle for an amount less than that stated in the policy, but the mortgagee refused to settle on the report of the appraisers and brought suit claiming a total loss of the residence. In such case though the appraisement was not binding on the mortgagee who might eventually recover more than the amount fixed by the appraisement, the insurer could not enjoin action for the furniture loss by the owner pending the mortgagee's action, and thereby enforce a set-off for the difference between the amount fixed by the appraisement and the mortgagee's recovery.

APPEAL from the chancery court of Jackson county.

HON. W. M. DENNY, Jr., Chancellor.

Bill by the Aetna Insurance Company against Mrs. J. M. Pelham and others. From a decree for defendants, complainants appeal.

This suit was begun by bill for injunction filed by the appellant as complainant in the court below, the object of the suit being to restrain the further prosecution of a certain suit at law filed by the appellee against the appellant in the circuit court until the final determination of a certain suit which was pending, at the time this bill was filed, between the treasurer of Jackson county against the appellant, which said suit was afterwards prosecuted to judgment through the supreme court and reported in 71 Miss. at page 746, 16 So. 255, reference to which is here made for a complete statement of the facts. Appellee, Mrs. Pelham, obtained a policy of insurance in the appellant company covering her house-

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hold furniture and residence, the furniture being insured for five hundred dollars and the residence for two thousand five hundred dollars, with a loss payable clause covering the residence in favor of the treasurer of Jackson county, mortgagee. A fire occurred, which totally destroyed the furniture, and, as was claimed, totally destroyed the dwelling house. Mrs. Pelham and the agent of the appellant insurance company attempted to enter into an appraisement, and after arbitrators had been chosen, they reported the loss on the dwelling to be two thousand and twenty-nine dollars and thirty-three cents. It is not disputed that there was a total loss on the furniture. The appellant offered to settle on the report of the appraisers, but the treasurer of Jackson county declined to accept settlement, and brought suit for two thousand five hundred dollars, claiming a total loss on the residence, which suit was prosecuted to judgment. Mrs. Pelham afterwards brought suit for five hundred dollars, claiming a total loss on her furniture, when she was met by this injunction suit to restrain her from prosecuting her suit at law. The chancellor sustained a motion to dissolve the injunction, and from a decree accordingly this appeal is prosecuted.

McLaurin & Arminstead, for appellant.

The theory upon which the injunction was obtained is: First: That, while technically and by reason of the operation of the statute when there is a mortgage clause, it constitutes such an independent contract as to enable the mortgagee to maintain a right of action thereon; at the same time there co-exists between all of the parties to the contract of insurance contractual relations, and the assured (Mrs. Pelham in this case) is as much interested in the collection of the insurance on the building which is affected by the mortgage clause as is the mortgagee and, furthermore, there is such unity of relation between the first and second items of the insurance, in

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so far as Mrs. Pelham is concerned, as to make one more or less dependent upon the other, and while they constitute separate rights in one sense, and probably enforcible, or at least divisible under separate contracts, at the same time they are so nearly related as to give the defendant Insurance Company the right to recoup for a claim arising against the assured on one item against a claim arising against the insurer on the other.

Second: The Insurance Company further claims a right shown in this case, as set out above, its right or remedy at law under the circumstances was not clear, adequate and complete, the right to recoup in the suit at law not being available thereon.

Third: Defendant Insurance Company further contended that an unfair advantage is sought to be obtained against it by the assured and the mortgagee in the institution and maintenance of the suits by Mrs. Pelham and Jackson county as separate actions in the circuit court.

We will discuss these questions now in the order stated. As to the first proposition. It is true that our court has held in the *East case,* 76 Miss. 687, and in the *Bacot case,* 96 Miss. 223, that the attachment of a mortgage clause to a contract of Insurance creates a new and independent contract between the mortgagee and the insurance company, i. e., it creates a contract upon which a separate right of action can, if necessary, be maintained, and one which is not subject to forfeiture because of a breach of affirmative or promissory warranties by the assured. This was all that was ever intended to be held by these cases, and it has been so specifically stated in the *Cowan Case,* quoted from above, where the meaning of the mortgage clause is fully explained. Counsel for defendant in this case, is however, trying to extend the decisions in the *East case* and the *Bacot case* far beyond their scope. The effort of that contention of counsel for defendant is to try and have this court hold that because of these decisions Mrs. Pelham has no interest in the result of this litigation between the mort-

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gagee (Jackson county) and the Aetna Insurance Company, and that the result, no matter what it is, or what it might be, either by a final judgment or on an award or an appraisement between the parties, i. e., between Jckson county and the Aetna Insurance Company, could in nowise affect the relationship between Mrs. Pelham and the Aetna Insurance Company on the five hundred dollars item for the household goods, or on the two thousand five hundred dollars item on the building.

The supreme court in the *Cowan case,* 111 Miss. 453, 71 So. 746, has specifically held that if the loss was a partial loss on the house, then the Insurance Company had a right as between itself and Jackson county, to an appraisement. It has also held in this case that the result of the appraisement, as between Mrs. Pelham and the Aetna Insurance Company, and the only result, was to make the arbitration void as to the county, in other words, as to Mrs. Pelham. It might reasonably follow and it certainly is not beyond the bounds of imagination that a new arbitration might still more reduce the amount of the loss and damage. If it did, it would certainly follow, it seems to us, that as between Mrs. Pelham and the Aetna Insurance Company, Mrs. Pelham could collect up to the amount of the award as between herself and the Insurance Company. On the other hand, if the award between the county and the Insurance Company should increase the loss and damage say, one hundred dollars or two hundred dollars, the payment of the liability to Jackson county of the amount due on its award would go to the benefit of Mrs. Pelham in paying that much of her debt to the county.

Our second proposition is as follows: "The Insurance Company further claims a right of injunction in this connection because under the facts shown in this case, as set out above, its right or remedy at law under the circumstances was not clear, adequate and complete, the right to recoup in the suit at law not being available therein."

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The court, of course understands that the suit between Jackson county and the Insurance Company was pending and unfinished when the injunction was obtained in this case, which is now sought to be dissolved. If the circuit court should find in the suit of *Jackson County* v. *Aetna Insurance Company,* that the loss on the building was total, or in excess of two thousand and twenty-nine dollars and thirty-three cents and collect in excess of this amount, then all money paid in excess of two thousand and twenty-nine dollars and thirty-three cents by the Aetna Insurance Company would be the payment by it of the debt of Mrs. Pelham to Jackson county which the Aetna, insofar as Mrs. Pelham is concerned, was not due, her.

Will an injunction to stay the proceedings at law instituted by Mrs. Pelham be maintainable under the circumstances? In other words, has a court of equity the right to enjoin proceedings in a court of law in order to give defendant time to enforce a contingent requirement, or set-off? In the Encyclopedia of Pleading & Practice, Vol. 10, page 952, it is said.

"(2) Irreparable defined.—Just when an injury will be irreparable, so as to justify a writ of injunction, it is perhaps not the province of a general rule to determine, because of the great variety of facts under which the allegation is made. It may be said, however, that an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which result therefrom cannot be measured by any certain pecuniary standard."

A large number of cases are cited in support of this doctrine. Among them will be found the case of *Jones* v. *Brandon,* 60 Miss. 556. 10 Encyclopaedia of Pleading & Practice, page 953.

We claim that the bill in this case is explicit and discloses the obstacles to adequate redress at law. Our court has upheld the same doctrine time and again; i. e.,

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if the remedy at law is adequate an injunction cannot be maintained, and if it is inadequate an injunction will be maintained. See *Pollard* v. *Phalem,* 53 So. 453; *Larsen* v. *Larsen,* 82 Miss. 116; *International Harvester Co.* v. *Still,* 53 So. 394; *Ricks* v. *Richardson,* 70 Miss. 424. In the case of *Fowler* v. *Payne,* 49 Miss. 32, our supreme court, in its opinion on page 71; Hilliard on Inj. 'Suits'; Eden on Inj. 'Proceedings at Law.'" *Warehouse Company* v. *Potts,* 69 Miss. 31; *McDaniel* v. *Hurt,* 92 Miss. 197; 10 Encyclopaedia of Pleading & Practice, page 1031.

The third proposition is as follows: Defendant Insurance Company further contended that an unfair advantage is sought to be obtained against it by the assured and the mortgagee in the institution and maintenance of the suits by Mrs. Pelham and Jackson county as separate actions in the circuit court. *Dunlap* v. *Steers,* 92 Cal. 344, 27 A. S. R. 145; *Curtis* v. *Schell,* 79 A. S. R. 107.

White & Ford, for appellee.

Counsel has cited no case, and we do not believe that he can cite any, that will uphold the doctrine for which he contends; that is to say, that a right of injunction is available in a case of this sort, where the most that the complainant can claim is that it might have something to set-off or recoup at some time in the future. Instead of being with him, the law as to this proposition is entirely against him, as will abundantly appear from 1 High on Injunction (2 Edition), at page 65, section 92, the author lays down this rule:

"Equity will not enjoin proceedings at law for the collection of a debt upon the ground that defendant in the action at law has a demand against the plaintiff not yet due, but which he desires to set-off against plaintiff's demand, the rule of set-off in such case being the same in equity as at law. And the mere existence of a

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counter-demand, or the pendency of an account between the parties out of which a cross-demand may arise, does not create such an equitable off-set as to warrant an injunction against an action at law." The author then cites a number of cases to support the rule. We submit that this authority is a complete answer to counsel's contention, and shows beyond question that the complainant had no right of injunction in this case.

It is horn book law that to constitute a valid set-off, there must be a present indebtedness upon a contract express or implied susceptible of ascertainment in amount. Furthermore, the part seeking the set-off must have such a cause of action as would enable him then to maintain an action thereon against the party against whom the set-off is claimed. This proposition is settled beyond controversy in Mississippi. See case of *Kershaw* v. *Merchants Bank,* 7 How. 386, 40 Amer. Dec. 70; also *Stone* v. *Buckner,* 12 S. & M. 73. The authorities hold further that an unmatured demand can never be the subject-matter of a set-off. See case of *Ratliff* v. *Davis,* 38 Miss. 107.

We conclude then as to the second proposition maintained by Counsel as follows: first, the complainant could never have any demand against Mrs. Pelham even though it paid the twenty-five hundred dollars to the county, for the reason that it has absolutely agreed with her, according to their contention, which is sworn to, that the loss on the building was only two thousand and ninety-seven dollars and ten cents. Secondly, the right of injunction is not available under the authorities above set out.

The third proposition contended for by learned counsel for appellant is that on account of the manner in which the two suits at law are being conducted; an unfair advantage is sought to be taken of appellant by Mrs. Pelham and the county. We do not know where counsel found the facts in this record to justify any such assertion. The language in his brief would justify

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the inference that there is some sort of concealed conspiracy or connection between the county and Mrs. Pelham to make the Insurance Company pay more than it ought to pay. Certainly there is nothing in the record to justify any such inference, but on the contrary, the facts, we submit, show beyond controversy, that Mrs. Pelham and the county are acting entirely independently one of the other. The facts would rather justify the conclusion, we submit, that Mrs. Pelham is the real victim in the case. In fact, she is placed in effect between Scylla and Charybdis, if the contention of appellant is to prevail. Mrs. Pelham has never undertaken to bind the county and the county has never disclosed any purpose or made any effort to bind Mrs. Pelham, so far as the record shows. In entering into the separate appraisement and proof of loss, Mrs. Pelham as shown by the correspondence set out in the record, was merely trying to collect the item of insurance on the furniture, and had nothing to do with the insurance on the building. If the county and Mrs. Pelham conspired to defraud appellant, that position should have been alleged and proven.

Counsel for appellant cites the case of *Dunlap* v. *Speers*, 92 Cal. 344. That case, we submit, is without applicability here, because the doctrine there announced was in reference to a judgment, and no judgment was ever rendered in this case, or in the county case. We are glad, however, that Counsel cited the case, because it shows that equitable relief can only be granted in a case like that, where an unfair advantage is about to be taken of another in a proceeding at law without negligence on the part of the adverse party. Now whose negligence was it that brought about this predicament? We submit that the whole difficulty would have been averted had the county been called on to enter into the appraisement in the beginning. The insurance company has voluntary placed itself in the position of which it complains.

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If appellant's contention is to prevail in this case, it merely means that Mrs. Pelham must await while the county and the Insurance Company see-saw backward and forward between the circuit court and the supreme court. The case went to the supreme court once, and will doubtless go there again. Mrs. Pelham has already been compelled to wait three years and no progress has been made yet. To sustain this injunction would amount virtually to a denial of justice to appellee, when she is without fault.

We submit that the case should be affirmed.

STEVENS, J., delivered the opinion of the court.

The injunction obtained by appellant in this cause was, in our judgment, properly dissolved by the chancellor, and the decree rendered by him must be affirmed. It cannot be presumed that appellant, as defendant in the suit being prosecuted by Mr. Cowan, county treasurer of Jackson county, holder of the mortgage clause in the policy, will be compelled to pay anything more than the insurance company is liable for or ought to pay. The mortgagee sues upon its independent contract with the insurance company, and, the mortgage indebtedness being in excess of the insurance on the dwelling house, is entitled to the full proceeds of that insurance. There would be no obligation on Mrs. Pelham to contribute toward the payment of any judgment recovered by the county treasurer of Jackson county against appellant on the policy in question. Appellant as defendant in that action has its day in court, and will be compelled to pay a lawful and not an unlawful amount. On the trial of that suit the defendant has its day in court on the issue of whether there was a total or partial loss of the dwelling house. Appellant by injunction attempts to assert a so-called offset and one not yet matured. Its claim grows out of an effort to bind Mrs. Pelham to an abortive appraisement. If the first appraisement en-

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tered into by appellant and Mrs. Pelham was not binding upon the mortgagee, as it evidently was not, Mrs. Pelham is no more to blame than the insurance company. She did what she was requested to do and all that she could do. What she did was in a commendable effort to avoid litigation. Her rights should not be affected by this void appraisement. Neither of the parties is in position to base any rights thereon. Conceding that appellant will ultimately have to pay the full amount of the insurance on the dwelling house, this in itself will give appellant no right of offset against Mrs. Pelham simply because her appraiser agreed, so far as she was concerned, to accept a less sum. Five hundred dollars on furniture, the collection of which is enjoined in this proceeding, is admittedly due. It should be promptly paid.

The chancellor awarded as damages a solicitor's fee of seventy-five dollars for services rendered by appellee's solicitor in the court below. There is a suggestion of damages and a motion for an allowance of a solicitor's fee in this court. This motion will be sustained and a fee of forty dollars allowed for services rendered in the supreme court.

Affirmed.

YAZOO & M. V. R. CO. v. GRENADA COUNTY ET AL.

[76 South. 154, Division A.]

1. COUNTIES. *Limitation of taxation. Construction of statutes.*

The limitation provided by chapter 85, Laws 1916, on the amount of taxes that boards of supervisors may levy, does not include taxes levied in order to raise revenue with which to discharge debts incurred by such boards under section 331 and 334, Code 1906, since by the general language there used, the legislature

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did not intend to withdraw from such boards the power to provide for the payment of debts which they had lawfully incurred.

2. HIGHWAYS. *Taxes. Validity.*

A two-mill road tax is valid under section 4469, Code 1906, provided the roads of a county are being worked by contract in accordance with section 4465 of the Code, and until the contrary appears the court must presume that they were being so worked.

APPEAL from the circuit court of Grenada county.

HON. H. H. RODGERS, Judge.

Suit by the Yazoo & Mississippi Valley Railroad Company against Grenada county and others to recover taxes paid under protest. From a judgment sustaining a demurrer to the declaration and ordering money to be paid to the county, plaintiff appeals.

The declaration in this case was filed by the appellant for the purpose of recovering certain taxes paid by it, under protest. The declaration alleges that the board of supervisors of Grenada county levied taxes for the year 1916 upon property assessed for taxation in said county as follows: six mills for state purposes, eight mills for payment of loan warrants and interest due thereon January 1, 1917; four mills for interest and charges and sinking fund on outstanding bonds of said county; four mills for general county expenses; two mills for road purposes; one and one-half mills for school purposes—making a total levy of twenty-five and one-half mills; and a further and additional levy of two and one-half mills was made for interest charges and sinking fund on consolidated district bonds and one-half mill for school purposes to be fixed and levied on all taxable property of the Holcomb consolidated school district of said county; making a total in that district of twenty-eight and one-half mills. It is also alleged that the sheriff and tax collector of said county demanded payment of taxes on the property of the appellant at the rate levied as aforesaid, and that appellant paid the taxes under protest to

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prevent the sale of its property for taxes. It is alleged also that the board was without authority in law to levy taxes in said county, including the state tax of six mills and excluding the road tax, school tax, courthouse tax, and agricultural high school tax, in excess of sixteen mills on the dollar, and that all taxes levied in excess of said limitation were void and without authority of law, and that there was no courthouse tax and agricultural school tax in said county, and that the levy fixed by the board, exclusive of road tax and county common school tax, exceeded the limitation of sixteen mills on the dollar, as provided by the acts of the legislature of Mississippi (chapter 85, Laws 1916) which provides as follows:

"Be it enacted by the legislature of the state of Mississippi, that the state *ad valorem* tax is hereby fixed at six (6) mills on the dollar for the year 1916, and at six (6) mills on the dollar for the year 1917. The board of supervisors may levy taxes for all purposes (exclusive of road, courthouse, county common school and agricultural high school), which, added to the state tax, will make sixteen (16) mills on the dollar for the year 1916, and sixteen (16) mills on the dollar for the year 1917, and no more."

It is alleged also that the road tax of two mills levied by the board is unlawful, because in excess of the amount authorized by section 4443 of the Code of 1906, which provides that:

"The board of supervisors, in case the labor and commutation for labor provided be found insufficient for the working of roads by contract, may levy an additional tax, the same to be upon all the taxable property in the county, and not to exceed one mill on the dollar in any one year, and to be collected as other taxes."

There was a demurrer to the declaration, in which the county sets up the fact that the additional levy of taxes made by the board was exempted from the provisions of chapter 85 of the Laws of 1916, for the reason:

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First, that the additional road tax was levied to meet the needs of the roads of the county, which were worked undr section 4469 of the Code of 1906, which provides for the levy of an "*ad valorem* tax not to exceed three mills on the dollar in any one year;" and, second, because chapter 85 of the Laws of 1916 did not mean to include within its limitations the amount of special levies provided for by sections 331 and 334 of the Code of 1906 for meeting and paying valid outstanding obligations of the county, and if such limitation were intended to apply to the levy of taxes to meet such obligations, then the law would be in conflict with the Constitution of the United States and the state of Mississippi, prohibiting the enactment of laws impairing the obligations of contracts. Sections 331 and 334 provide for the levy of a special annual tax to be used exclusively in paying interest on bonds and providing a sinking fund for their retirement, and for the repayment of any loan warrants and interest thereon which any county may execute for the purpose of obtaining money to defray the expenses of the county. From the judgment of the court sustaining the demurrer and ordering the money paid to the county, this appeal is prosecuted.

Mayes, Wells, May & Sanders and *Cowles Horton*, for appellant.

The question raised by the third and fourth grounds for demurrer is, whether the limitations prescribed by Laws 1916, are applicable to and cover taxes leviable under sections 331 and 334 of Code of 1906. The answer to this question seems so clear to our mind that were this an appeal by the appellees, we should content ourselves by merely citing the act involved and the decision hereinafter cited, construing the similar Laws of 1908. If the learned court below has correctly interpreted the act in question, then the proper construction is contrary to its express language and is in square conflict with the previous decisions of this court.

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The act involved (Laws 1916, ch. 85, p. 73), after fixing the state tax for the years 1916 and 1917 at six mills on the dollar, provides as follows: "The board of supervisors may levy taxes for all purposes (exclusive of road, courthouse, county common school and agricultural high school tax) which, added to the state tax, will make sixteen mills on the dollar for the year 1917, and no more."

Our contention is that this act means exactly what it says, and that the board could levy, excluding the specially exempted taxes, only sixteen mills on the dollar "for all purposes"—"and no more." That all taxes levied in excess of these restrictions are illegal, and that the excessive levy was unwarranted and without authority in law. This interpretation is, indeed, the plain and express language of the act. The words employed are clear, unambiguous, and positive. In such case, we invoke the familiar rule, first in the construction of all written instruments, that the language should control. *Hawkins* v. *Carroll Co.*, 50 Miss. 759; *Peeler* v. *Peeler*, 68 Miss. 147; *Wells* v. *McNeil*, 93 Miss. 407.

It is far too late to question the soundness of *Wells* v. *McNeil*. Whether the construction of Laws 1908 was sound or unsound and it is clearly the former that construction has been too repeatedly adopted by the legislature to depart from it at this time. Can there be any question, therefore, as to what is included and what is excepted from the limitation of the laws involved? Can the courts, by construction or otherwise, add another exception to the ones fixed by the legislature in exempting certain special taxes from its limitation? The rule *expressio unius est, exclusio alterius* applies with peculiar force in view of this legislative action. *Koch* v. *Bridgers*, 45 Miss. 261. See 90 Am. St. Rep. 447; 7 Idem. 555; 10 L. R. A. (N. S.) p. 135; *Dailey* v. *Swope*, 47 Miss. 379; Cooley, Taxation, p. 324; *Moore* v. *Foote*, 32 Miss. 479; *Beard* v. *Lee County*, 51 Miss. 547; *Foote*

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v. *Brown*, 60 Miss. 161; *Monroe County* v. *Strong*, 78 Miss. 571.

An examination of the history of these sections 331 and 334, confirms the view we have taken. Under Code 1871 (Sec. 1382) as construed by this court, the board had the right to make its contracts and allowances upon the basis of credit prices. This rule was changed in 1892, by the adoption of a statute requiring that these things be handled on a cash basis (Sec. 322, Code 1892). This brought about a "radical change" in the state's policy in this regard (78 Miss., p. 574) and of course, this subject received the attention which the change required. At the same time and because of this change, the legislature enacted these sections, then sections 311 and 313, Code 1892. The one was enacted in order that money might be raised by the issuance of long time bonds; the other to secure the money by a short loan; payable on the first day of the next succeeding January and out of the first moneys collected as taxes during that year. The object of these statutes—the very purpose of the change was to decrease, not to increase, the expenses of the county and the burdens of the taxpayer. Laws 1892 providing the tax levy for that year and the next, limited the board to the levy of taxes at twelve and one-half mills on the dollar "for all purposes" including, of course these newly created purposes providing for an additional levy of five mills for counties having outstanding indebtedness. That legislature, therefore changed the old system of county finances, created new authority for the board in order to provide the ready funds and continued, as had been previously done, to provide its limitation as to taxes, "for all purposes." Authority to tax under these new sections (331 and 334 of the present code) created a new "purpose" for which the levy might be made, but, at the same time, the board was still required to keep within the limitations fixed by the biennial revenue laws.

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Save for an immaterial change in section 311 (Code 1892) in 1900, these sections of Code 1892 remained untouched from that time until 1904. During that period, the legislature was using the same language in fixing the annual limitations as is found in the act involved. In 1904, both of these sections were amended. Laws 1904, pages 189 and 195. The legislature was again dealing with these sections and the taxing limitations at the same time and by Laws 1904, page 87 again fixed the limitation at sixteen mills on the dollar, "for all purposes"—"and no more." Again, it provided for an additional two-mill levy for school purposes. These three acts were approved the same day. March 22, 1904.

In 1906, the code of that year was adopted and the legislature again considered these sections and the taxing limitations together. Laws 1906, page 75, fixed the limitations at that time, using the same comprehensive language. Were these special taxes exempted from these various limitations?

Laws 1908 were the next acts upon the matter and in the case of *Wells* v. *McNeill,* these laws were interpreted to include all taxes. Laws 1910, page 72; Laws 1912, page 65; Laws 1914, page 87, and Laws 1916, page 73, using the same language as used in 1908 and the former acts, were enacted in the light of the construction placed upon that language by the case cited. In each of these last acts, the legislature had excepted from their restrictions certain special, designated taxes, so as to exempt them from their limitations. Everything else is included; every tax, regardless of purpose and of how levied, fall within their terms, and the court can no more exempt one tax than it can another.

In 1910 (Laws, p. 192) and 1912 (Laws, p. 306), sec. 331, of the Code of 1906, was again amended. Neither in the amendments nor the revenue laws, fixing the limitations then, do we find any legislative intent that this tax shall be exempted. On the other hand, since these

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sections were first enacted, every legislative action has been to manifest a clear intent that taxes levied under them are not to be excluded from the tax rate limitations.

Sec. 307, Code 1906, just as its predecessor in the Code of 1892 had done, provides that the board's levy shall be of taxes within the limitations prescribed by law." Unless these limitations are to be found, in the biennial acts fixing the rates, they do not exist at all. *People v. May,* 9 Colo. 454, 12 Pac. 838.

The learned court below went off upon a misapplication of the case of *Beck* v. *Allen,* 58 Miss. 155, and *Peterson* v. *Kittredge,* 65 Miss. 35. The court construed those cases to hold that taxes, leviable under sections 331 and 334, were exempted from the limitations of the Laws of 1916. That construction was erroneous and it was also error to apply the doctrine of those cases in reference to the local acts there involved to the sections of the code here in question. Because the court in those cases upheld the special taxes levied under local laws in addition to taxes levied under the general statutes, the learned court below upheld the taxes here levied under sections 331 and 334. The error of this action becomes apparent upon an examination of these cases.

In the other case (65 Miss. 35) a like situation prevailed. The local Act of 1872 (p. 188) authorized Leflore county to issue bonds to Carroll county and levy a special tax therefor. The general law of 1875 (p. 52) fixed the general county limitation at twenty dollars on the thousand. It was held, following *Beck v. Allen,* that the general act did not repeal or take away any of the rights given by the former local law and the tax levied thereunder, was upheld. In this case, likewise, the local act had been executed and the bonds issued thereunder.

Those cases differ from the case at bar in two particulars, which particulars form the very basis of the court's rulings, namely: (1) The court was considering special local laws which remained unrepealed and unaffected

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by the later general act. (2) The obligations provided for in those local laws had been executed and third parties had secured under them vested rights before the general Act of 1880 in the one case and of 1875 in the other were enacted. Neither of these conditions are true of the case at bar.

The rule of harmonizing local and general laws (applied in the cases just cited) is a familiar one and no better illustration of its application will be found than in *Jones v. Melchoir*, 71 Miss. 117.

If our contention of Laws 1916 is wrong, then the court was in error in *Wells v. McNeil*, in interpreting the language upon which appellant relies. The legislature has, likewise been guilty of the veriest folly in excepting from the operation of the various tax rate laws the special taxes therein exempted. The road, courthouse, school and agricultural high school taxes, exempted from the operation of Laws 1916, are all special taxes, leviable under particular statutory authority. The statutes conferring the right to levy them take equal rank with sections 331 and 334 and taxes under the former, stand with equal dignity as do taxes under the latter. If no exceptions are necessary to save the latter tax, then none would be required to save the former, and thus we find the legislature persistently doing the useless thing of making any exceptions.

The board of supervisors is a tribunal of strictly delegated authority and nowhere is found a closer observance of its limitations than in the levying of taxes. By various statutes the board is given the right to do various and sundry things, to do those things, they are authorized to tax the people. At the same time, and, for the very purpose of preventing excessive burdens, the board is limited, not only to a strict observance of the various statutes conferring jurisdiction, but also by the requirements that the county taxes shall never exceed the limits fixed by these taxing laws. This, after all, is of equal importance to the people, and closer in its effects

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to the average citizen. If we, therefore, brush aside the language of the act, disregard or misconstrue the plain meaning of its terms, and permit the levying of another tax than the ones allowed by the limitations of the law, we defeat the very object of the restriction. This is bound to be true, because the reason for the exemption in the one case would be the same as in all others, to wit: statutory authority to levy the tax, and there would, therefore, be no limitation, save that the county "ordinary tax" could not exceed, in this instance, ten mills on the dollar. All the rest leviable as will be seen under other statutes, would be freed from the restrictions.

The road tax levied under section 4443 of the Code, was fixed at two mills and is, therefore, excessive by one mill. The section cited applicable generally, fixes the limitation at one mill, and there is nothing in these proceedings whereby it appears that this statute does not control. The demurrer, going to the whole declaration, should have been overruled for this reason, if we are wrong in reference to the six mill excess.

W. M. Mitchell, for appellee.

The contention of counsel for appellant, in brief in this: That, although the legislature says to the board by sections 331 and 334 of the Code of 1906 that you may issue bonds of the county to an amount not to exceed five per cent of the assessed value of the property, and loan warrants up to fifty thousand dollars, for certain purposes, therein specified, provided, you first obtain the consent of the people, and provided, further, that you make special levies to take care of and redeem these obligations at maturity, and although the board in good faith have acted upon the authority granted them under these statutes and complied with all the conditions thereof to legalize their acts, yet the legislature can come along afterwards and say to the board that we authorized you to issue these obligations and sell them to

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innocent purchasers and take their money and use it for the public benefit, and the people of the county also authorized you to do this, yet you cannot levy more than ten mills to pay this special tax levy which we required you to make, and also to pay all general current expenses of the county for the year 1916, thus virtually nullifying these sections without any pretense of or attempt at repealing them. And counsel base their argument to sustain this contention, and practically stake their case upon the decision of the court in the case of *Wells* v. *McNeil*, 93 Miss. 407.

Let us therefore, at the beginning of this argument, consider the facts upon which the decision in that case was based and see if it sustains appellant's contentions. Briefly stated, the facts in that case were as follows: That board of supervisors of Newton county desired to erect a new court house. To do this they first submitted the question of a bond issue for that purpose to the people of the county under section 331, Code of 1906, but this proposal was rejected by the people. Thereupon the board attempted to proceed under sections 313 and 324, which authorized the board to make a special levy for this purpose, but did not provide for submitting the question to the people.

The board advertised for a building to cost from thirty thousand dollars to fifty thousand dollars, and made a special levy of four and one-half mills to apply to the payment of same. This levy was insufficient by at least ten thousand dollars to pay the cost of this building, and any greater levy would have brought the total levy for that year above the limit fixed by the Act of 1908. Upon this state of facts it was held, and properly so, that this proceeding was illegal because the board not only had not been authorized to exceed the limitation of the act, but had been expressly prohibited from so doing by their adverse vote. In other words the board cannot incur an indebtedness which would require them to exceed the general limit of taxation, without

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being specially authorized to do so by the people who have to bear the burden of the extra taxes thereby incurred. To quote the exact language of the learned special judge in that case: "The only way in which a burden of future taxation can be laid on the people is the right to express their will by an election. If the board could pay the entire debt by a special levy under section 324 without exceeding the limits of the general statute then they could legally proceed under sections 313 and 324, but if not they must resort to section 331, and let the people say whether or not they are willing to bear the additional burden of taxation."

This decision simply followed and reaffirmed the decision in the case of *Monroe County* v. *Strong,* 78 Miss. 565, where the questions as to the powers of the boards of supervisors is very fully and extensively discussed, and legislation, both constitutional and statutory, relating to their powers of taxation gone into. But neither the case of *Wells* v. *McNeil* nor that of *Monroe County* v. *Strong,* are in conflict with or attempt to overrule the case of *Beck* v. *Allen,* 58 Miss. 143, and *Peterson* v. *Kittredge,* 65 Miss. 40, 3 So. 65, which latter case cites and reaffirms *Beck* v. *Allen.* On the contrary *Beck* v. *Allen, supra,* was expressly referred to and approved in *Monroe County* v. *Strong,* and we submit that the law as announced in *Beck* v. *Allen* and *Peterson* v. *Kittredge,* is the law today and has been always the law in Mississippi. See ——— v. *Klein,* 51 Miss. 807; *Gamble* v. *Witty,* 55 Miss. 26. The rule laid down in these cases is that where there are valid outstanding obligations of the county it is not only the right, but the duty of the board to provide for their payment, and if they fail or refuse to levy a tax sufficient for this purpose the holders of the obligations can force them to do so.

Counsel for appellants, realizing that the cases of *Beck* v. *Allen,* and *Peterson* v. *Kittredge, supra,* are squarely against their contentions and virtually put them out of court, make a very strenuous effort to break

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their force and effect by arguing that these decisions were dealing with local acts and therefore have no application to sections 331 and 334, Code 1906.

A brief consideration of these acts and a comparison of them with the sections of the Code just quoted will convince the court that there is no merit in this position of counsel, but that, if there is any difference in the binding force as between them it would be in favor of the Code sections, because these sections were passed in 1892 in order to comply with sections 87 and 88, Constitution of 1890, requiring the legislature to provide by general laws for protecting and taking care of local interests, instead of passing local laws as had been the custom theretofore, and for the further and very potent reason that these sections require the boards to go to the people before issuing bonds and other obligations of the county for which special and extraordinary levies of taxes must be made, while the foregoing local acts did not require this. Let us, then, examine the facts upon which these cases were decided. The acts of 1871, p. 657, authorized Warren and other counties named, to issue bonds to refund past indebtedness and to defray current expenses; the Act of 1873 provided for levying of school district taxes; and the Act of 1878 authorized Warren and other counties named to issue bonds to compromise and take up bonds held by a railroad company and which were then in suit, etc., both Acts of 1871 and 1878 provided that the boards of supervisors should levy annually special taxes to pay interest and create a sinking fund for the redemption of said bonds. Under the authority of these acts the board of supervisors of Warren county issued the bonds therein provided for and levied special taxes to provide for them, which together with the levy for the ordinary expenses of the current year ran the levy up to twenty-five mills, for the year 1880, while the General Revenue Act of 1880 fixed the limits at twelve and one-half mills, but provided that, counties having outstanding indebtedness might levy up

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to fifteen mills, "for all purposes, and no more," using the identical language used by the Act of 1916. Beck enjoined the tax collector of Warren county on the ground that this levy was excessive and illegal, as to the excess over fifteen mills under said Act of 1880, on the grounds, first, that the Act of 1880 expressly repealed these local acts, and second, that Act of 1880 limited the board to fifteen mills "for all purposes, and no more," and that the board must provide for these bonds within that limit— exactly the same contention as made by appellant in this case. The court will note that complainant there made out a stronger case than the one at bar for the reason that the Act of 1880 did actually attempt to repeal "any and all laws or parts of laws in conflict with this act" while the Act of 1916 did not even profess to repeal sections 331 and 334, Code 1906 under which the bonds and loan warrants in this case were issued and which expressly required the board to levy special taxes to take care of them. Thus it will be seen that the same points were made there as here, viz: complainant contended that the statute meant exactly what it said, and the board was limited to amount fixed therein, and no more, and the board must keep within these limits regardless of what obligations the county had outstanding, while on the other hand, defendant insisted that these special acts authorized the board to exceed the limits fixed by the general statute, where it was necessary to do so in order to meet the valid and binding obligations of the county; otherwise, the act so limiting the board would be void because violating the obligations of contracts, etc.

In response to these contentions Judge GEORGE, who, as my friend Mr. Horton very justly stated, was a "strict constructionist" and contended that the legislature had the right to limit the taxes which boards of supervisors could levy, even under the Constitution of 1869, speaking for the majority of the court, held: "The position that the special levies under the local Acts of

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1871 and 1878 which authorized the board of supervisors to issue bonds and required them to make a levy of a special tax to meet them are restricted by the Act of 1880, is untenable. The local acts on their face confer a power to levy the special tax in addition to and outside of the levies limited by law. Acts of that character are not presumed to be within the general words of repeal in a general statute. Besides, these special acts to be issued, and the collection of them by the county was a part of the obligation of the contract contained in the bonds."

Certainly the obligations created under local acts which did not provide for the submission of the question of their issuance to the taxpayers of the county are vested with no greater solemnity nor require of the boards creating them the exercise of any higher power or authority in taking care of them, than those created under general laws which the Constitution of 1890 required the legislature to pass to provide for the people interested before levying this special and extraordinary tax, who, in the language of this court "are the legitimate source of all authority" and with whose will, properly and legally expressed, this court will not attempt to interfere, since the courts have nothing to do with the wisdom or necessity of the laws, which is purely a legislative question. *Rosenstock* v. *Board of Supervisors, etc.*, 72 So. 876; *State* v. *Wheatley*, 74 So. 427.

Summing up our argument: Our position and contention is that while it is a well settled rule that the taxing power is vested in the legislature and that the only power which boards of supervisors have to levy taxes is derived from and conferred upon them by the legislature, yet we say that this power can be conferred with or without limitattions, just as the legislature sees proper, and further that the Constitution and the legislature can confer other powers upon the boards, and these powers may be such as to impliedly carry with them the power to tax, and that when such other powers

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thus conferred have been exercised by the board and they have contracted liabilities thereunder, then the authority is necessarily implied to discharge these liabilities in the manner required by the act conferring the right to create them. *Murch* v. *Warren County,* 73 Miss. 356; *Cox* v. *Wallace,* 100 Miss. 541. And that the legislature cannot by a general law deprive the holders of these liabilities of their rights in the premises; and it is upon these sound principles of law that the decisions in *Beck* v. *Allen* and *Peterson* v. *Kottredge, supra,* were based; and it is upon these, that counsel for appellees stakes his case and confidently looks for an affirmance of this case by this court, since any other holding would, we respectfully submit, amount to holding that the legislature could pass laws which would result in the violations of contracts and hence violate the state and federal Constitutions.

SMITH, C. J., delivered the opinion of the court.

1. We are of the opinion that the limitation provided by chapter 85, Laws of 1916, on the amount of taxes that boards of supervisors may levy does not include taxes levied in order to raise revenue with which to discharge debts incurred by such boards under sections 331 and 334, Code of 1906; for it is hardly possible that by the general language there used the legislature intended to withdraw from such boards the power to provide for the payment of debts which they had lawfully incurred.

2. The two-mills road tax is valid, under section 4469 of the Code, provided the roads of Grenada county were being worked by contract in accordance with section 4465 of the Code; and until the contrary appears, we must presume that they were being so worked.

Affirmed.

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STATE EX REL, COLLINS, ATTORNEY-GENERAL v. SENATOBIA BLANK BOOK & STATIONERY CO.

[76 South. 258, In Banc.]

1. COMMERCE. *Interstate commerce. Constitutional provisions.*

Laws 1916, chapter 135, section 3, prohibiting the letting by boards of supervisors of counties of contracts to furnish the county with blank books, stationery, etc., to any bidder who is a nonresident of the state, who has not a printing plant in the state or who is not a *bona-fide* resident of the state actually engaged in the printing business is not violative of article 1, section 8 of the Constitution of the United States giving Congress the right to regulate commerce among the several states, since such provision of the Constitution is not intended to affect contracts which have an indirect or remote bearing on commerce between the state.

2. SAME.

It is only direct interference with the freedom of interstate commerce that brings the case within the exclusive domain of federal legislation, the state in the exercise of its police power may make regulations which indirectly affect interstate commerce.

3. CONSTITUTIONAL LAW. *Privileges and immunities.*

Chapter 135, section 3, Laws 1916, is not violative of Constitution of the United States, article 4, section 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, since counties are mere political subdivisions of the state for the purpose of exercising a part of its powers and may exert only such powers as are expressly granted to them or necessarily implied from those granted, hence regulation of their contracts is a regulation of the contracts of the state and no one is entitled to absolute right to contract with the state.

4. CONSTITUTIONAL LAW. *Privileges and immunities. Due process of law. Equal protection of laws.*

Chapter 135, section 3, Laws 1916, is not violative of the Constitution of the United States, amendment 14(A), providing that no state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law.

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5. COUNTIES. *Contracts. Constitutional and statutory provisions.*

Section 3, chapter 135, Laws 1916, is not violative of section 107 of the Constitution, providing that stationery, printing, etc., used by the legislature and other departments of the Government shall be performed under contracts subject to the approval of the governor and state treasurer, since a county is not a department of the state but a political subdivision.

6. CONSTITUTIONAL LAW. *Wisdom of statute. Legislative question.*

With the wisdom of a legislative act the courts have nothing to do, that is a matter entirely for the lawmaking body. It is solely the duty of the court to say whether or not the act as passed by the legislature is violative of any of the provisions of the state or federal Constitutions.

7. QUO WARRANTO. *Grounds. Exercise of corporate franchise and powers.*

Under section 417, Code 1906, *quo warranto* was the correct procedure for the attorney-general of the state to pursue, where a corporation practiced fraud in obtaining its charter and the acts of the alleged corporation under its charter have all been in violation of law.

8. QUO WARRANTO. *Admissions.. Demurrer.*

A demurrer to an information in a *quo warranto* proceeding admits all the allegations contained in the information and it is the duty of the supreme court on appeal in reversing the case, to assume that the allegations are true as stated.

APPEAL from the circuit court of Tate county.

HON. E. D. DINKINS, Judge.

Quo warranto by the state, on the relation of Ross A. Collins, Attorney-General, against the Senatobia Blank Book & Stationery Company. From a judgment of the court sustaining a demurrer to the information and dismissing the case, the relator appeals.

The facts are sufficiently stated in the opinion of the court.

R. H., J. H. and Fulton Thompson and *Ross A. Collins*, Attorney-General, for appellant.

Mayes, Wells, May & Sanders, for appellee.

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SYKES, J., delivered the opinion of the court.

This was a *quo warranto* proceeding instituted in the circuit court of Tate county by the state of Mississippi, on the relation of the Attorney-General, against appellee, a corporation, organized under the laws of Mississippi, domiciled in Tate county. The defendant demurred to the information, which demurrer was sustained by the circuit court, and the cause dismissed; from which judgment sustaining the demurrer, this appeal is prosecuted.

Among other things, the information alleged: That shortly after the passage of chapter 135, Laws of 1916 (p. 193), prohibiting the letting by boards of supervisors of the several counties of contracts to furnish the counties with blank books, stationery, etc., to any bidder who is a nonresident of the state of Mississippi, who has not a printing plant in the state, or who is not a *bona-fide* resident of the state actually engaged in the printing business, the charter of incorporation of appellee was applied for and granted. That the objects and purposes of the application for this charter of the appellee were not to enable it to do a lawful business in the state, but that its objects and purposes were unlawful and fraudulent; its objects and purposes were to circumvent the statutes of the state and to perpetrate a fraud on the laws of the state. That the objects and purposes of the incorporators were to enable Geo. D. Barnard & Co., of St. Louis, Mo., a nonresident printing, blank book, and stationery company, to make contracts with the various boards of supervisors of the counties of the state in the name of the appellee company for the furnishing of the blank books and stationery and necessary printing required by law to be done by them.

A part of the information reads as follows:

"In short, the defendant company was incorporated to be, and is, a mere dummy of the said Geo. D. Barnard & Co. Defendant company never has had, and has not now, a printing nor a blank book nor a stationery plant

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in this state of sufficient capacity to execute the contracts which it has obtained formerly from several counties of the state, as hereinafter shown, nor to execute the several contracts which it has sought to obtain from any other counties. Its entire purpose has been to obtain contracts for blank books, stationery, and printing from the counties in its name and to have the said contracts executed by Geo. D. Barnard & Co., the aforesaid nonresident printing, stationery, and blank book company.

"In pursuance of such fraudulent intent and purpose, and with the design and intent to defeat the laws of this state, the said defendant corporation, falsely pretending to be a *bona-fide* resident of this state and a domestic printing, blank book, and stationery company, has deceived and defrauded the boards of supervisors of various counties of this state."

The information prays for judgment of forfeiture and ouster against the appellee.

The demurrer admits the allegations alleged in the information, and its sole object and purpose is to challenge the constitutionality of chapter 135 of the Laws of 1916 (p. 193).

Section 1 of this act provides the method to be followed by the board of public contracts in the making of contracts for the state printing proper and for the different departments of the state government. That section of the act does not deal with the contracts for printing stationery, etc., for the counties. Section 3 of the act relates to the letting of the contracts by the various boards of supervisors and is the act before us for construction. As amended, this act now reads as follows:

"The boards of supervisors of the several counties of the state shall, on the last Monday in July, 1916, or as soon thereafter as practicable, and on a corresponding date every two years thereafter, after having advertised in some local newspaper for thirty days inviting sealed proposals, let to the lowest responsible bidder

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contracts for the purpose of record and blank books, tax receipts, warrant books, pay certificates, stationery, office supplies, legal form and such other books and blanks as are used by the county and district officers. They shall classify same into the following classes: (1) Blank books and record books; (2) printed blanks and printed stationery; (3) ruled and printed blanks; (4) tax receipts, warrants and such forms in simple binding; (5) stationery and office supplies and furniture, not including specially ruled or printed work; and the same shall be let by classes, and all contracts for county printing of the second and third classes shall be by the supervisors and awarded to the lowest responsible bidder of local printing establishments in the respective counties, provided the same can be satisfactorily done there. Also local dealers of the various counties shall be allowed the same privileges of bidding for the furnishing of files, furniture, etc., in the fifth class, as is herein provided for the local printing establishments for the second and third class. If no contract is made for any one of the schedules except those held by the local printers of the respective counties, the officers shall buy supplies not contracted for through the contractor, provided his prices are equal to those of other printing establishments. Contracts for other classes may be awarded to worthy and capable printing establishments of this state, actually engaged in the printing business, and paying taxes thereon in the state, and classified schedules shall be furnished by the board of supervisors to prospective bidders on request, clearly showing and clearly defining what is wanted of each of said classes of work, and, besides, the clerk of the board of supervisors shall, at least ten days before the awarding of contracts, forward by mail, postage prepaid, such classified schedules to at least twelve printers or printing establishments of character and ability, all of whom shall be residents of this state. Proposals shall be ad-

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dressed to the clerk of the board of supervisors and shall be so marked as to designate what it is."

The demurrer in this case challenges: First, the constitutionality of this act, alleging that it violates the commerce clause, section 8, article 1, of the federal Constitution; second, that it violates section 1 of the Fourteenth Amendment of the federal Constitution; and, third, that it violates section 107 of the Constitution of Mississippi; fourth, that said information does not charge any present or past violation of any law. It is also argued in the brief of the appellee that this act is violative of article 4, section 2, of the federal Constitution. There are other assignments in the demurrer, but they are not seriously pressed upon us by the appellee, and we do not think it necessary to notice any save those above enumerated.

We shall first consider the question as to whether or not this act is violative of any of the provisions of the Constitution of the United States above mentioned. Article 1, section 8, gives Congress the right "(3) to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Article 4, section 2:

"(1) The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of the Fourteenth Amendment:

"(a) No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That the legislature has the power to enact laws regulating the letting of contracts for its printing and that of its subdivisions is not and cannot be questioned. That the county is a subdivision of the state is also not questioned.

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The first question, then, is: Does this act violate any of the enumerated provisions of the federal Constitution? The act in question does not attempt to regulate any contracts save those of the state itself and its subdivisions, which are, upon the last analysis, contracts of the state. In other words, by this act the state is but regulating and saying with whom it will make its own contracts for work of this character. It is well also to bear in mind that an individual has a perfect right to make a contract with any one whom he pleases. It follows, also, that the state has a right to make a contract with any one whom it pleases unless it contravenes in some way either the federal or the state Constitution. The law in question in no way attempts to regulate interstate commerce. The section of the act in question is a direction to the officers of the counties prescribing the manner and from whom they shall receive bids for the county supplies mentioned in the act. These county officers are agents of the county and can only act by legislative authority, and in the making of these contracts these acts only relate to the regulation of the state's and its subordinates' own business. Neither the state nor any county can be forced, without its permission, to enter into a contract with an individual or a corporation without its (the state's) permission, unless there is some provision in one of these Constitutions requiring it to do so. There is no such express provision in either of the Constitutions. While the state cannot be compelled without its consent to enter into a contract with any individual or corporation, yet the act in question expressly provides how both resident and nonresident citizens or corporations may qualify to bid for the work provided for under this act. The sum and substance of the act is merely to compel those who desire to do this work for the state or its subdivisions to become amenable to the process of the courts of the state and to do certain of the work within the limits of the state. These are reasonable regulations for the welfare of the state and its

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subdivisions; the object being to protect the state from bidders who are without the jurisdiction of the state and also having in view the upbuilding of the state by the construction within its limits of the establishments necessary to do this work. This may very well be classed as a police regulaton.

In these days of quick communication and transportation among the states of the Union, in its broadest sense, any contract made by a state or its subdivision may in some way indirectly affect interstate commerce. That is to say, most likely some of the raw or manufactured material which may be used in its public buildings or in the furnishing or outfitting of any of the county or state offices, may be transported into the state from another state. This in no way is an interference with interstate commerce. The supreme court of the United States, in a case which is directly in point on this proposition, has stated the law in these apt terms:

"The right of a state, in the exercise of the police power, to make regulations which indirectly affect interstate commerce, has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the state, will in a limited degree affect interstate commerce; but it certainly is not one of those direct interferences with the power over, and express control of, the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the states there is scarcely any contract which cannot, in a limited or remote degree, be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of federal legislation." *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

In the case above quoted from, in further discussing the question as to whether or not the commerce clause of the federal Constitution was violated, the court says:

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"It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."

It was necessary to transport into the state of Missouri the asphalt contracted for in that work.

The remaining objections to this law, under the federal Constitution, are disposed of in the case of *Atkin* v. *Kansas,* 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. The state of Kansas passed laws making it a criminal offense for a contractor to permit or require an employee to perform labor upon public works in excess of eight hours a day. This law was violated by the appellant, who was convicted, and prosecuted an appeal to the Supreme Court of the United States. The appellant Atkin, when he violated this law, was constructing a brick pavement for the municipality of Kansas City. The contention of the appellant in that case was that the law in question violated the first section of the Fourteenth Amendment.

"These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. (Citing authorities.) In the case last

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cited (*Williams* v. *Eggleston*, 170 U. S. 304, 310, 18 Sup. Ct. 617, 42 L. Ed. 1047, 1049), we said that 'a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.' . . .

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private, character.

"If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of any one. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condtion of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questies, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or

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for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to reveiw its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

"If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom,

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annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question." *Atkin* v. *Kansas,* 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148.

The same contentions so earnestly and ably insisted upon by the appellee in the present case were insisted upon in the Atkin Case, so liberally quoted from. Paraphrasing part of the above quotation, a complete answer to the argument in this case of appellee is as follows: It is sufficent to answer that no person engaged in the stationery business is entitled, of absolute right and as a part of his liberty, to contract with or to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

The act in question in no way violates any provision of the federal Constitution.

It is contended by the appellee that the act violates section 107 of the Constitution of the state of Mississippi, which reads as follows:

"All stationery, printing, paper, and fuel, used by the legislature, and other departments of the government, shall be furnished, and the printing and binding of the laws, journals, department reports, and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislature and its committees, shall be performed under contract, to be

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given to the lowest responsible bidder, below such maximum and under such regulations as may be prescribed by law. No member of the legislature or officer of any department shall be in any way interested in such contract, and all such contracts shall be subject to the approval of the Governor and State Treasurer."

A complete answer to this contention is that section 107 is not in question here. It only relates, according to its plain provisions, to contracts for the stationery, etc., of the legislature and other departments of the state government, which contracts are subject to the approval of the Governor and the State Treasurer. The contracts of subdivisions of the state, such as counties, are not intended to be approved by the Governor and the State Treasurer. They are not departments of the state, as are contemplated by the above section, but are mere subdivisions of the state. This is manifest when we consider the laws of the state relating to these various state contracts contemplated by section 107. Section 1 of the act here in question relates to those contracts covered by section 107 of the Constitution. The construction of that section is not here involved, and for that reason we do not feel called upon to consider its constitutionality in this case.

Kindred acts of other states have been held not violative either of their state or the federal Constitutions, in the cases of *Knight* v. *Barnes*, 7 N. D. 591, 75 N. W. 904, and *In re Gemmill*, 20 Idaho, 732, 119 Pac. 298, 41 L. R. A. (N. S.) 711, Ann. Cas. 1913A, 76. In the latter case there is quite an extended case note discussing the constitutionality of these various acts.

The able counsel for appellee severely criticize and arraign the wisdom of this act. They say it is but a shallow pretense to give a monopoly to resident printers and stationers of Mississippi. With the wisdom of the act this court has nothing to do. That is a matter entirely for the lawmaking body. It is solely our duty to say whether or not the act as passed by the legislature is violative of any of the provisions of the state or federal

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Constitutions. We find none of the provisions of either Constitution violated.

It is further contended that an information by *quo warranto* was not the proper remedy for the attorney-general to pursue. The information alleges that the incorporators obtained this charter for fraudulent purposes; that the charter was fraudulently obtained; that all of the acts of the corporation and of its incorporators are violations of the law of the state. We find in the brief of appellee a quotation from the case of *State ex rel. Clapp* v. *Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510:

"But we think it may be safely stated as the general concensus of the authorities that, to constitute a misuser of the corporate franchise such as to warrant its forfeiture, the *ultra vires* acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. But in case of excess of powers it is only where some public mischief is done or threatened that the state, by the attorney-general, should interfere."

The information in this case not only alleges that a fraud was practiced upon the state in obtaining the charter, but that the acts of this alleged corporation under this charter are all violations of the law. Under the facts alleged in the information, and under section 4017 of the Code of 1906, *quo warranto* was eminently the correct procedure. The demurrer, of course, admits all the allegations contained in the information, and it is our duty to assume, in reviewing this case, that these allegations are true as stated. The information should have been answered.

The judgment of the lower court is reversed, and the cause remanded, with leave to the appellee to answer within thirty days after the mandate of this court is filed in the lower court.

Reversed and remanded.

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COOLEY ET AL. v. TULLAS ET AL.

[76 South. 264, Division A.]

1. LOGS AND LOGGING. *Liens for labor. Statute.*

Under chapter 131, Laws 1908, employees of a sawmill have concurrent liens on their employer's lumber, which may be enforced as to all of them in one suit in chancery.

2. APPEAL AND ERROR. *Reversal. Form of action.*

Under Constitution 1890, section 147, so providing, where the circuit court assumes jurisdiction of a cause of action to enforce the lien of employees of a sawmill against their employer's lumber under Laws 1908, chapter 131, and proceeds to judgment, it will not be disturbed on the ground that the action should have been brought in the chancery court.

APPEAL from the circuit court of Smith county.

HON. W. H. HUGHES, Judge.

Suit by J. S. Tullas and others against J. Cooley and others. From a judgment for plaintiffs, defendants appeal.

Appellees were employed as laborers at the sawmill of appellants, and were engaged in the manufacture of lumber. They brought a joint suit in the court of a justice of the peace for wages due them for several months, aggregating one hundred, forty-nine dollars and fifty-five cents and sued out a writ of seizure, which was levied upon certain lumber of the appellants; the proceedings being had under the provisions of chapter 131, Laws of 1908, which provides as follows:

"Section 1. That every employee or laborer of a person, partnership, or a corporation engaged in operating a sawmill, planing mill, or in cutting and shipping (or rafting) timber shall have a lien on all such timber of his employer, for his wages due by such employer, in preference to all other debts due and owing from the owner thereof. But such lien shall take effect as to pur-

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chasers or incumbrances for a valuable consideration, without notice thereof, only from the time of commencing suit to enforce the lien.

"Sec. 2. That the lien herein provided may be enforced and trial and judgment had in the same manner as the lien for purchase money is enforced under the provisions of the chapter on lien for purchase money of goods.

"Sec. 3. That the lien hereby created shall expire three months after the claim is due unless judicial proceedings have commenced to assert it."

Section 3080 of the Code of 1906 is as follows:

"Any seller of personal property, or his assigns, who shall be about to begin suit for the purchase money thereof, may file with his declaration or evidence of debt an affidavit designating the property sought to be subjected and averring therein the liability of the property, in whole or part, for the debt sued on; whereupon the clerk of the court, or justice of the peace in cases before him, shall issue a writ of summons and seizure commanding the officer to seize the property and deal with it as in the case of an attachment for debt, and to summon the defendant as in other cases. The defendant may replevy the property as in case of attachment against debtors."

There was a judgment for the plaintiffs below for the amount sued for, and the defendant's appeal, contending that there was a misjoinder of parties, inasmuch as each of the appellees had a separate cause of action against the appellants.

A. M. Edwards, for appellants.

At the trial of this cause in the circuit court the defendants made a motion there to dismiss the case for the reason that there was a misjoinder of plaintiffs in the case; and this is one of the assignments of error, which we insist is well taken.

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If appellants were due these several plaintiffs, or appellees each, certain sums of money for labor done at appellants' mill, then each one of these plaintiffs had a separate and distinct cause of action against appellants, and their causes of action could not be joined in a suit like this.

Chapter 131 of the Laws of 1908, under which plaintiffs were proceeding when they instituted this suit, and seized the said lumber, reads as follows:

Section 1. Be it enacted by the legislature of the state of Mississippi, that every employee or laborer of a person, partnership, or corporation engaged in operating a sawmill, planing mill, or in cutting and shipping (or rafting) timber, shall have a lien on all such lumber and timber of his employer, for his wages due by such employer, in preference to all other debts due and owing from the owner thereof. But such lien shall take effect as to purchasers or incumbrances for a valuable consideration, without notice thereof, only from the time of commencing suit to enforce the lien.

How same may be enforced and judgment had.

Sec. 2. That the lien herein provided may be enforced and trial and judgment had in the same manner as the lien for purchase money is enforced under the provision of the chapter on lien for purchase money of goods.

Sec. 3. That the lien hereby created shall expire three months after the claim is due unless judicial proceedings have commenced to assert it.

Sec. 4. That this act, shall take effect and be in force from and after its passage. Approved March 20, 1908.

Sec. 3080 of the Code of 1906, reads as follows: "Proceeding to enforce any seller of personal property, or his assigns, who shall be about to begin suit for the purchase money thereof, may file with his declaration or evidence of debt an affidavit designating the property sought to be subjected and averring therein the liability of the property, in whole or in part for the debt sued on;

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whereupon the clerk of the court, or the justice of the peace in cases before him, shall issue a writ of summons and seizure, commanding the officer to seize the property and deal with it as in the case of an attachment for debt, and to summon the defendant as in other cases. The defendant may replevy the property as in case of attachment against debtors."

The legislature by the above act referred to has given laborers at sawmills a lien on the lumber manufactured for his wages, and also has said how this lien shall be enforced and this procedure must be followed, otherwise the procedure will be void.

In the case at bar the plaintiffs have no community of interest, but that their rights are separate, there can be no doubt; any one of these plaintiffs could have sued and recovered against these defendants without prejudicing the action of the other.

There might have been set-offs and counterclaims and recoupments affecting in the least the other plaintiffs. If these plaintiffs can all join in their actions against the defendants in the case at bar, then four plaintiffs or fifty or more persons might sell a cow apiece to a drover, and on his failing to pay for the cows, institute suit as pointed out by statute, seize the cows and all join in the same suit because they all have a purchase money lien on the cows while they are in the hands of the first purchaser. This under our statute cannot be done, but on the other hand each and every party would have to institute a separate suit for the reason there is no community of interest, the fact alone that they all have a lien on the cows for the purchase money is not at all sufficient. But it is essential that the parties to the suit have a community of interest both in the subject of action and the relief demanded before they can join in the same suit.

There is no statute in this state which authorizes the joinder of plaintiffs in suits like the one at bar; neither does the common law permit of such.

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The rule governing the joinder of plaintiffs in a common law action turned on the distinction between joint and several interest. Whether the action arose from a contract or from a tort, if defendant was legally answerable to two or more jointly they should all, at common law, join as plaintiffs in the action, unless a valid excuse for the non-joinder appears, on the face of the pleading. The interest being joint, existed an entirety; and one person ought not to be allowed to sue alone for the whole of that of which he is entitled to only a part. The right of action was collectively, and only so; no agreement in the premises enabled them to sue separately. On the other hand, when the interests were several, there could as a rule be no joinder, even when the rights of all the plaintiffs had been violated by one and the same wrongful act on the part of defendant, or had arisen *ex contractu* out of one and the same transaction with defendant. See 30 Cyc., p. 106; *Barry* v. *Rogers,* 2 Bibb. (Ky.) 314; *Hinchman* v. *Patters Horse R. Co.,* 17 N. J. 975; 15 Encyclopedia of Pleading and Practice, p. 540.

We most respectfully submit that the case should be reversed and remanded.

T. J. Wills, for appellee.

The objection urged by appellants in the court below, and the question presented here for determination is whether appellees could enforce their lien against the lumber jointly or are they required, under the law, to proceed by separate attachments on the same property.

It will be observed that chapter 131 of the Acts of 1908 was not enacted primarly for the purpose of affording a method of accounting as between an employer and employee engaged in the sawmill business, but has for its purpose the imposing of a lien upon the product of the labor for the payment of the wages due him. The accounting and determination of the amount due the

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employee by the employer is incidental to, and subordinate to the remedy given by the law. The law itself designates that a lien shall be enforced and trial and judgment had in the same manner as the lien for purchase money is enforced.

The chapter on liens for the purchase money of goods, chapter 83 of the Code makes no provisions for proceedings where there are other parties with liens of equal priority and character on the same goods. In fact, it is impossible for several liens of the same priority and character to exist on the same property for purchase money. Since ownership of goods is single, even though there may be more than one interested party owing as tenants in common. If we are to look to the Code for the procedure, therefore, in cases like the one under consideration, we find in sections 3062 and 3063 of the Code of 1906, the method to be pursued and the parties to be named in suit similar to the one at bar. Section 3063 provides that "all persons having an interest in the controversy and all persons claimng liens on the same property . . . shall be made partes to the suit."

It is our contention that this section controls in all suits of this character. That all parties having a like lien upon the property must be made parties to the proceedings to enforce the lien against the property. There are two reasons why such a proceeding is necessary:

First: If the outstanding indebtedness subjecting the property to a lien was twice the amount of the value of the property, and the parties entitled to the lien should all attempt to enforce their rights in separate suits, there would be no way of making a distribution of the proceeds of the property among the several claimants, and the first half of the number so fortunate as to have their cases heard, would have their claims discharged in full leaving the remaining claimants without remedy. An equal distribution could only be had by all the claimants having their claims adjudicated in one suit.

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Second: Since the suit is primarily one to enforce a lien against the lumber for labor, if separate attachment suits were brought by each and every one of the claimants the defendants would be entitled, under the authority of the rule of law laid down by this court, in the line of decisions beginning with *Tribett* v. *I. C. Railroad Co.*, 12 So. 32, and culminating with the leading case of *Cumberland Telephone & Telegraph Co.* v. *Williamson*, 57 So. 559, to enjoin the prosecuton of the separate suits and have the rights of all the parties determined in one suit. If the defendant could require plaintiffs to adjudicated their rights in one suit, then plaintiffs have a right to have their lien enforced, and their debts collected in one or a joint suit. The right of the plaintiff being enforceable in a joint suit, section 3063 affords the remedy to be pursued.

HOLDEN, J., delivered the opinion of the court.

Under chapter 131, Laws 1908, plaintiffs below had a concurrent statutory lien upon the property seized, which could and should have been enforced in the chancery court. The statute makes no provision for the enforcement of the lien where there are several persons with liens of equal strength upon the same property; but the chancery court had jurisdiction to enforce the lien as to all of the three plaintiffs against the property in one suit, and the circuit court having assumed jurisdiction of the cause, and proceeded to judgment, we will not disturb the judgment, in view of section 147 of the state Constitution.

We find no reversible error in the record.

Affirmed.

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COHN v. WINSLOW.

[76 South. 246, Division A.]

GUARDIAN AND WARD. *Loss of money by guardian. Liability of surety.* Under Laws 1914, chapter 201, providing that when the chancellor designates the person to whom the money of the ward shall be loaned and the loan is so made, responsibility shall not thereafter attach to the guardian, where pursuant to an order of the chancellor permitting the guardian to place a sum of money in a named bank or other safe bank and providing that the "court does not relieve" the guardian or his bondsmen the guardian deposited the money of his ward in the named bank. In such case his sureties on his bond were not liable for loss of the ward's money due to the failure of the bank, the court having no power to add to their liability under the statute without their consent.

APPEAL from the chancery court of Lincoln county.

HON. O. B. TAYLOR, Chancellor.

The matter of the guardianship of Lenora J. Winslow, a minor, from an order of the chancellor holding Louis Cohn surety on the guardian's bond liable for loss of the minor's money, he appeals.

L. H. Baggett was appointed by the chancery court of Lincoln county guardian of the estate of the appellee, a minor, and executed bond with appellant, Cohn, and one Becker as sureties on his guardian's bond. The guardian received two thousand, five hundred dollars of the ward's money, and reported the collection of same to the chancery court, and petitioned to be allowed to place the money in the Commercial Bank & Trust Company of Brookhaven, or in some other safe bank at the discretion of the guardian. The court granted the prayer, rendering the following decree:

"This cause this day came on for hearing on petition of L. H. Baggett, guardian, for permission to place the amount of money now in his hands as guardian, which is

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two thousand, five hundred dollars, with the Commercial Bank & Trust Company, or some other safe bank in th discretion of the guardian at five per cent. per annum, and the court, having heard same, doth order, adjudge, and decree that L. H. Baggett, guardian of Lenora J. Winslow is hereby permitted to place said sum of money with the Commercial Bank & Trust Company or some other safe bank, at the discretion of the guardian, at the rate of five per cent. per annum. In granting this order the court does not relieve L. H. Baggett and his bondsmen from liability to Lenora J. Winslow for the safety of said money."

Some months later this bank failed, and afterwards, when the guardian presented his first annual accoun reporting the collection of a portion of the amount so deposited or loaned to said bank, and asked credit for the amount uncollected by reason of the failure of the said bank, because it had been loaned by him as guardian under specific directions of the court, the ward, through her attorney, contested the account, insisting that the sureties on the guardian's bond should be held liable for the amount of the ward's money lost by reason of the failure of the bank, because of the fact that Baggett, the guardian, was assistant cashier of the said bank, and Becker was cashier and Cohn one of the sureties, was a director in the said bank, and at the time the loan was made it was understood and so ordered by the decree of the chancery court that the sureties should not be relieved from liability to said minor for the safety of the money so loaned. On the trial it was agreed that the loan was made by the guardian as a permanent investment, and not as a temporary deposit, and that the guardian made no further effort to invest the money. Baggett and Becker were shown to be insolvent, and the court held Cohn liable for the loss of the money of the minor, and from an adverse decree he appeals.

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Luther J. Tyler, R. H. & J. H. Thompson and *Fulton Thompson,* for appellant.

It has been established in Mississippi, certainly since the decision of the case of *Coffin v. Bramlett,* 42 Miss. 194, that so long as a guardian keeps himself strictly within the line of duty and exercises reasonable care and diligence, he cannot be held responsible for any loss of or depreciation in the funds entrusted to him.

Under Mississippi Code 1906, section 2416, Mississippi Code 1892, section 2200 it is the duty of a guardian, having in hand money of his ward not needed for current expenditures, or not directed to be invested, to apply to the court or chancellor in vacation for directions as to the disposition he shall make of it. Upon such application the court or chancellor is required to determine whether the guardian shall lend it at interest and upon what security or how he shall dispose of it; and the statute expressly provides that if the court or chancellor designate the person to whom the loan shall be made, or the security on which it shall be made, and the loan be so made, responsibility shall not attach thereafter to the guardian. In this case Baggett, the guardian, applied to the court, under the provisions of the statute, and obtained the decree hereinbefore quoted.

We submit two propositions to the court. The determination of either of them in appellant's favor will require a reversal of the decree from which the appeal is prosecuted and will put an end to this case.

First: The decree under which the money was invested with the Commercial Bank & Trust Company expressly authorizes and empowers the guardian to so invest the money. Its words are that Baggett, the guardian "is hereby permitted to place the sum of money (meaning the twenty-five hundred dollars) with the Commercial Bank & Trust Company." It is an exact compliance with the statute, Mississippi Code, section 2416.

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The appellee, however, will claim that additional words incorporated in the decree take the case out of the statute but in this we think the appellee is mistaken. It is true the decree empowered the guardian to make other deposits of the funds at his discretion. It fixed the rate of interest at which the money was to be loaned at five per cent. The concluding clause of the decree in these words: "In granting this order the court does not relieve L. H Baggett and his bondsmen from liability to Lenora J. Winslow for the safety of said money," can have no reference to a loan made to the Commercial Bank & Trust Company. It applies only to a loan made to some other person, and the guardian was left with the discretion to loan it to some other person if he thought proper.

To construe the words quoted from the decree, as applying to a loan to the Commercial Bank would make them nullify the statute, and a construction of a decree which nullifies a statute should never be made. It is due to the good sense and legal learning of the trial court that the judge thereof should be credited with a knowledge that a decree of the court cannot change the statute and impose liability where the statute exempts from liability.

Second. Even though the decree be construed in the way in which the appellee seeks to construe it, Baggett, the guardian is not liable for the loss which resulted from the loan to the Commercial Bank & Trust Company because he is not shown to have exercised faulty discretion or to have failed to exercise reasonable care and diligence in and about the making of the loan. While he was assistant cashier of the bank he believed it perfectly solvent at the time he made the loan to it. He had no reason then and no reason afterwards to suspect its insolvency or to apprehend that it would go out of business until after eight-thirty o'clock on the morning on which the assignment was made.

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We earnestly contend that the record wholly fails to show that he did not use ordinary care and diligence in making the investment in question or that he was not actuated by good motives. If either proposition be true, he is not personally chargeable with the loss, nor can the sureties on his bond be held liable.

We ask a reversal of the decree appealed from and that this court adjudged that the guardian should be credited on his account with the amount of the loss which resulted from the loan to the Commercial Bank & Trust Company of Brookhaven, Mississippi.

H. V. Wall, for appellee.

Section 2416 of the Code of 1906, directs what should be done where a guardian has in his possession surplus money or property of his ward. Said section reads as follows:

"Whenever the guardian shall have money of his ward not needed for current expenditures, or directed to be invested for the ward, he shall apply to the court, or chancellor in vacation, for directions as to the disposition he shall make of it; and the court or chancellor shall determine whether he shall lend it at interest and upon what security, or how he shall dispose of it; and if the court or chancellor designates the person to whom the loan shall be made, or the security on which it shall be made, and the loan be so made, responsibility shall not thereafter attach to the guardian; but if the court or chancellor shall intrust him with discretion in the matter, he shall be bound for the exercise of sound judgment, and the court or chancellor may direct an investment in the bonds of the state or of the county or municipality thereof, or of a levee board, or of the United States. Any guardian who fails to report to the court the fact that he has money of his ward not needed or allowed to be used for current expenditures, and to ask the order of the court as to the disposition of such

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money, shall be chargeable with interest on the same, at the rate of ten per cent per annum during the time of failure."

Where a guardian has surplus money in his hands he must have an order of the court before he can invest it, or he and his bondsmen shall be liable in case of loss. See 21 Cyc., page 88, and *Davis* v. *Harris,* 13 Smedes & Marshall, page 9.

We call the court's attention to the wording of the order in which the court directs upon what conditions the money shall be loaned to the Commercial Bank & Trust Company. The order distinctly says that it shall be put there with the distinct understanding that neither the guardian nor his bondsmen are relieved. We call the court's especial attention to the wording of the petition of the guardian for an order of the court in which the guardian plainly sets out that he does not ask to be relieved, or to have his bondsmen relieved from liability to the ward if the court directs the money to be placed with the Commercial Bank & Trust Company. Therefore the court will note that the chancellor ordered the money loaned as a permanent investment to the Commercial Bank & Trust Company, and direct what security the guardian should take. That is, that the guardian should be personally liable and that his bondsmen should be personally liable if the loan was made to the Commercial Bank & Trust Company. We call the court's attention to the provisions of section 2416 of the Code of 1906, wherein it states, "that the court or chancellor shall determine whether the guardian shall loan at interest the money in his hands and upon what security;" and said section further provides that the guardian shall follow the order of the court and shall make the loan in accordance with the order. In the case at bar we submit that if the guardian made the loan to the bank according to the order of the court both the guardian and his bondsmen are liable.

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We call the court's attention to the case of *Corcoran* v. *Kostrometoniff,* 21 L. R. A. (N. S.) 399. Justice GILBERT in the above styled cause lays down this to be the rule. "While the effect of an order of the court authorizing the loan or investment is to protect the guardian so far as he proceeds in compliance therewith, there can be no doubt that, in order to avail himself of such protection he must obtain the order in the manner pointed out by the statute, if there be a statute, relating to the procedure." And said case further holds that where the order is obtained it must be followed, or else the guardian acts without an order. See also 55 Am. St. Rep. 904.

The making of a loan by a guardian without security is a breach of his official duty, and he and his bondsmen become liable to the ward (see 21 Cyc., page 91). *Lee* v. *Lee,* 55 Ala. 590; *Harbin* v. *Bell,* 54 Ala. 389; *Butterick* v. *Heft,* 21 Am. Dec. 374.

We call the court's attention to the case of *Real Estate and Guardianship of Bennett Wood,* 159 Cal. 466, 36 L. R. A. (N. S.) 252.

If the guardian under the law is liable, then the appellant is liable. See *Bell* v. *Rudolph,* 12 So. 153, where our court holds that the bondsmen are liable where the ward's funds are lost.

Counsel in their brief argue at length the question of "good faith" and the question of "faulty discretion" and the question of the "exercise of reasonable care and diligence." These questions, in our judgment, have nothing on earth to do with a decision of this case. This case must stand or fall upon the petition of the guardian and the order of the court. The questions of reasonable care and faulty judgment are not the issues in this case, because it is our contention and the authorities above cited so hold, that the guardian was compelled to obtain an order of the court before he could loan the money in his hands. The question of getting an order was not discretionary with the guardian, but it was absolutely necessary. Then if he obtained an order it was

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absolutely necessary for him to follow the order, and the question of "good faith," "sound judgment," etc., could not in any way enter into his transaction. Then if he relied upon the order of the court he must follow the order, and if he does not follow the order then he and his bondsmen are liable, and this is true, regardless of the good faith, bad or good judgment, or any other consideration.

Smith, C. J., delivered the opinion of the court.

Section 2416, Code of 1906, as amended by chapter 201, Laws of 1914, prescribes the measure of liability that attaches to a guardian, and consequently to his sureties, for loans made by the guardian pursuant to an order of the chancellor, and the chancellor, without the consent of the sureties, is without power to add to the liabilty there fixed upon them, and in the case at bar, while the guardian may have agreed to remain liable for the safety of the money to be loaned in accordance with the chancellor's order, the sureties did not; and, since the guardian obeyed this order and the statute in making this loan, his sureties are not responsible for any loss of the ward's money that may result by reason thereof.

Reversed and remanded.

Yazoo & M. V. R. Co. v. McGee-Dean Co.

[76 South. 264, Division A.]

Limitation of Actions. *Pleading.*

The statute of limitations cannot be interposed by a demurrer but must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it.

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APPEAL from the circuit court of Washington county. HON. F. E. EVERETT, Judge.

Suit by the Yazoo & Mississippi Valley Railroad Company against the McGee-Dean Company. From an order sustaining a demurrer to the declaration, plaintiff appeals.

This suit was instituted by the appellant as plaintiff in the court below, to recover of the appellee a balance alleged to be due on freight charges upon a shipment of cotton. The declaration alleged that the agent had undercharged the appellee. The suit was instituted almost six years after the shipment was made. The defendant demurred to the declaration, setting up the three-year statute of limitations on open account. The demurrer was sustained, and judgment entered for defendant, from which this appeal is prosecuted.

It is the contention of the appellant that the statute of limitations can only be pleaded by special plea and not by demurrer.

Mayes, Wells, May & Sanders, for appellant.

Can the defense of the statute of limitation be availed of in the circuit court by demurrer? Upon the first question we submit that in the circuit court the defense of the statute cannot be availed of by demurrer, but it must be specially pleaded. As to the proper way of pleading the statute of limitations we cite the following decisions of this court: *Hines* v. *Potts,* 56 Miss. 346, a suit at law, lays down the rule that the bar of the statute of limitations cannot be availed of by demurrer to the declaration, even though the cause of action stated may appear to be barred. *McNair* v. *Stanton,* 57 Miss. 298, a suit in the chancery court lays down the rule that it is competent to raise the defense of the statute of limitations by demurrer. *Shaultz* v. *Kemp,* 57 Miss. 218, was a suit in the circuit court but does not seem to squarely raise the question. *Cox* v.

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Free-Hold Land & Mortgage Co., 40 So. 739, a suit in the chancery court, refers to the above cases but decides that the issue was raised neither by plea or demurrer. *Y. & M. V. R. R. Co.* v. *Kirk*, 58 So. overruling the same case in 58 So. 710, the case being one in the circuit court, decides that the statute of limitations must be specially pleaded. *Jordan* v. *Holmes*, 59 So. 809, a case in the circuit court, refers to *Hines* v. *Potts*, and holds that the statute of limitations must be specially pleaded. *Central Trust Co.* v. *Railroad*, 64 So. 216, a case in the chancery court, lays down the rule that in equity, the defense of the statute of limitations can be made by demurrer, when the facts establishing it appear on the face of the bill.

It therefore appears to be well settled by the decisions of this court, that in law, the statute of limitations must be taken advantage of by special plea but in equity may be set up as a ground for demurrer.

The instant case was a suit at law, and we submit that the demurrer based upon the statute should have been overruled.

Eugene Gerald and *Percy Bell*, for appellee.

We submit that while the authorities quoted by appellant clearly indicate that the desirable method of pleading the statute of limitations is by plea and not by demurrer; that this mistake in pleading if mistake it were, does not constitute reversible error. If the demurrer had been overruled, or stricken out in the court below and the defendant asked to plead the same, issue would have been presented in that court as in this. There would have been no material effect upon the rights of the parties on account of this matter of technique in pleading.

We submit for the consideration of the court as to the consideration, which will be extended to technicalities of pleading, the following: *Gibson-Moore Mfg.*

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Company v. *Meek*, 15 So. 786 and Rule 11 of this court.

"No judgment shall be reversed on the ground of misdirection to the jury or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

SMITH, C. J., delivered the opinion of the court.

The statute of limitations cannot be interposed by a demurrer, but "must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it." *Hines* v. *Potts*, 56 Miss. 346.

Reversed and remanded.

NEW ORLEANS & N. E. R. Co. v. SCARLET.

[76 South. 265, Division A.]

1. MASTER AND SERVANT. *Evidence of want of skill. Statute.*
Laws 1912, chapter 215, providing that in all actions against railroads proof that the injury was inflicted by the running of an engine or cars shall be *prima-facie* evidence of want of skill and care, being but a rule of evidence, is applicable to a case brought under the Federal Employers' Liability Act (Act April 23, 1908, ch. 149, 35 Stat. 65, U. S. Comp. St. 1916, sections 8657-8655) since in all matters of procedure the *lex fori* governs.

2. APPEAL AND ERROR. *Exclusion of testimony. Matters not in record.*
The supreme court on appeal cannot review the exclusion by the court below of the testimony of a witness where, while the record discloses the question sought to be propounded to the witness, it does not disclose what his answers thereto would have been so that the courts may judge of the materiality and relevancy thereof to the issue being tried, and if material, whether appellant was prejudiced by the exclusion thereof.

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APPEAL from the circuit court of Clark county.

HON. R. W. HEIDELBERG, Judge.

Suit by Joe Scarlet against the New Orleans & Northeastern Railroad Company. From a judgment for plaintiff, defendant appeals.

Appellee was a fireman upon the second engine of a double header freight train upon the appellant's railroad. The train stopped at a small station, and in starting again the engine and tender upon which appellee was riding pulled apart, due to the breakage of the king pin, which fastened the drawbar to the tender. At the time of the accident, appellee was standing with one foot on the deck of the engine, and one foot on the tender, in the act of throwing coal into the fire box. The engine and tender pulled apart, and he was dropped between the two and injured. He brought suit under the federal Employers' Liability Act and recovered a judgment of two thousand, five hundred dollars, from which the railroad company appealed. On the trial the appellee, plaintiff below, requested and received the following instruction:

"That the *prima facie* statute of Mississippi is a rule of evidence and is admissible and binding even though the plaintiff's right of action is circumscribed and controlled by the act of Congress know as the Employers' Liability Act, and that proof of injury from the running of defendant's engine and cars is *prima facie* evidence of negligence on the part of the defendant, and in order to meet same the defendant must show facts and circumstances surrounding the occurrence, and thus show to the jury that there was no negligence on its part and that this presumption is not met by conjecture and surmise.

Appellant contends that the *prima facie* evidence statute of Mississippi (section 1985, Code of 1906, as amended by chapter 215, Laws 1912) is not applicable in a case brought under the federal Employers' Liability Act. Appellant also assigned as error the action of

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the court in excluding the testimony of Dr. Reynolds, the physician who examined the appellee after his injury, which was objected to by the appellee as coming within the privilged communications, and therefore protected by section 3695, Code 1906.

R. H. & J. H. Thompson, A. S. Bozeman and *Ben F. Cameron, Jr.*, for appellant.

Thos. G. Fewell and *Chas B. Cameron,* for appellee.

SMITH, C. J., delivered the opinion of the court.

Section 1985, Code of 1906, amended by chapter 215, Laws of 1912, as construed in *Railroad Co.* v. *Thornhill,* 106 Miss. 387, 63 So. 674, deals, not with a substantive right, but only with a rule of evidence (*Lumber Co.* v. *Pierce,* 106 Miss. 672, 64 So. 461; Id., 235 U. S. 380, 35 Sup. Ct. 133, 59 L. Ed. 279), and, since the *lex fori* governs in all matters of procedure, the court below committed no error in charging the jury in accordance therewith.

We cannot review the exclusion by the court below of certain testimony sought to be elicited by appellant from Dr. Reynolds on his examination in chief; for the reason that, while the record discloses the questions sought to be propounded to the witness, it does not disclose what his answers thereto would have been so that we may judge of the materiality and relevancy thereof to the issue being tried, and, if material, whether appellant was prejudiced by the exclusion thereof. *Railroad Co.* v. *Robinson,* 106 Miss. 896, 64 So. 838.

We find no reversible error in the other matters complained of.

Affirmed.

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LAVECCHIA v. TILLMAN.

[76 South. 266, Division A.]

1. LANDLORD AND TENANT. *Actions. Pleading. Sufficency.*

A plea to an action for the balance of rent due under a lease, that the lease was void because the lease was entered into in contemplation of the premises being used for the unlawful sale of intoxicating liquors, sets up a good defense.

2. EVIDENCE. *Parol evidence.*

Parol evidence is admissible to show the unlawful purpose for which a lease was made.

APPEAL from the circuit court of Warren county.

HON. J. C. BRYSON, Special Judge.

Suit by A. G. Tillman against Joseph Lavecchia. From an order sustaining a demurrer to his pleas, defendant appeals.

Appellee, the owner of a storehouse in Vicksburg, leased same to the appellant. The lease provided that:

"The business for which said premises is leased is the sale of soft drinks or near beer, but nothing herein contained, nor verbal understanding, shall give the right to said lessee to conduct any unlawful business herein."

The lessee also obligated himself to comply with all city ordinances in relation to said premises.

The building was rented for a period of nine months at a rental of one hundred dollars for the first three months, and one hundred and twenty five dollars for the last six months. Appellant obtained the city and state license for selling "near beer" and opened business, and unlawfully and notoriously engaged in selling whisky, beer, and other intoxicating liquors, until some time in November, when he was stopped by order of the court.

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Some time after the expiration of the lease, appellee filed suit against appellant to recover rent for four months of the term of the lease, which had not expired at the time appellant's place of business was closed by order of the court.

Appellant filed three pleas, the first of which alleged that there was an agreement between the lessor and lessee, that the appellant was to occupy said building for the purpose of selling intoxicating liquors, in violation of the laws of the state; that this fact was well known and consented to by the lessor; that the recital in the face of the lease was intended as a mere subterfuge; and that therefore the agreement was illegal and void. The second plea alleged that the defendant was prevented from carrying out his contract of lease by reason of an injunction suit of the courts, enjoining him from continuing in business or further occupying or using the building. The third plea alleges that, at the time the lease contract was executed, there was an ordinance in the city of Vicksburg permitting an issuance of "near beer" licenses, and that during the month of December, and before his lease had expired, the authorities of the city of Vicksburg repealed said ordinance and revoked and declared forfeited all near beer licenses, which prevented the defendant from carrying out his contract or lease.

The appellee demurred to the several pleas, and the court sustained the demurrers, and this appeal was prosecuted.

Henry & Canizaro, for appellant.

The court below commited a fatal error in sustaining the plaintiff's demurrer to each of the defendant's special pleas and we will now proceed to take up the questions of the issue raised by each demurrer in the order in which they appear.

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First: It is admitted by the demurrer, that the landlord knowingly leased his property to the appellant for the illegal purpose of selling intoxicating liquor, and parole evidence is admissable to expose the immoral and unlawful character of the transaction, it being against the public policy.

By the first demurrer (to the appellant's special plea) the appellee contends that Mr. Levecchia could not introduce parole evidence to expose the unlawfulness of the transaction because that would vary the term of the written contract. The authorities are unanimous that parole evidence is admissible. 9 Cyc., page 766.

5. Evidence of Illegality. Where a contract is assailed on the ground that it is illegal and void, the defense may be and generally is established by evidence *aliunde*, for the rule which forbids the introduction of parole evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law. It is competent to prove that a written contract was executed on Sunday and is therefore invalid, although it purposes on its face to have been executed on another day. When the consideration for a contract is the compounding of a felony, the contract is void, and evidence tending to show that no crime was in fact committed is not admissible. And a *fortiori* statements of the prosecuting attorney in regard to the merits of the prosecution are not admissible."

The illegality of the contract was a question of law for the court below on the issue made out by the pleading, and the demurrer should have been overruled. 9 Cyc., page 777. *Charles S. Houghton Receiver, etc.*, v. *Williams S. Burden, U. S. Supreme Court Rep.*, 57 Law Ed. 780, 228 U. S. 161; *Scott* v. *Lloyd*, 9 Pet. 418, 9 L. Ed. 178; *McWilliams County Treasurer* v. *Phillips*, 51 Miss. 196.

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The case of *Mitchell* v. *Campbell,* recently decided by this court and reported in 72 So. page 231, appears to us should be decisive of the case at bar. *Ryan et al.* v. *Potwin, Trustee,* 62 Ill. App. 134; *Stillman* v. *Lovelace,* 152 Ill. App. 332; *Ashbrook* v. *Dale,* 27 Mo. App. 649; *Dougherty* v. *Seymour,* 16 Colo. 289, 26 Pac. 823; *Sherman* v. *Wilder,* 100 Mass. 537; *Sprague* v. *Rooney,* 104 Mo. 349, 16 S. W. 505; *Bank* v. *Owens,* 2 Pet. 538, 7 L. Ed. 508.

The court will not assist either party in any transaction where in the nature of things it will "be made the handmaid of iniquity." *Deans* v. *McLendon,* 30 Miss. 443; *Rideout* v. *Mars,* 54 So. 801, 95 Miss. 423; *Cooper* v. *River.*

We respectfully submit this case should be reversed.

McLaurin & Arminstead, for appellee.

In reference to the effect of the demurrer by the plaintiff, to defendant's special plea, for the convenience of the court we cite 6 Encyclopedia of Pleading & Practice, p. 326, which shows that a demurrer of this kind searches the whole record, especially so when the special plea in question specifically refers to the lease contract, and that the lease contract must be taken into consideration in connection with the plea in determining the sufficiency of the demurrer. In other words the demurrer in this case did not admit under the pleadings that there was collusion between these parties to do an unlawful act, but it simply admitted what had already been set up, that the agreement, whatever it was, was shown in the face of the lease contract. See 6 Encyclopedia of Pleading & Practice, pp. 336 and 337, *et seq.,* as to extent of admissions by demurrer. On page 337 the text is as follows:

"Averments in a complaint as to the meaning or contents of a paper set forth therein or annexed to and made a part thereof, are not admitted by the demurrer,

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with the possible exception of what may be, by reasonable intendment implied from the facts alleged or conclusions of law which are legitimate deductions from such facts."

We cite the court also to the case of the *State of Mississippi for the use of Clark-West & Company* v. *Bowen,* 45 Miss. 347, which shows that a demurrer to a plea can be carried back to the declaration, and we submit that it can be carried back to the declaration for the benefit as well as the detriment of the plaintiff filing the demurrers, especially where an exhibit to the declaration is specifically referred to in the plea demurred to. See, also, *McGavock* v. *Whitfield,* 45 Miss. 452.

We deem it entirely too elementary to undertake to cite authorities to sustain the proposition that in the absence of fraud, parol evidence cannot be introduced to contradict written instruments, and in this case we submit that although this first special plea undertakes to set up a fraudulent state of facts, that the plea utterly fails to do so for reasons above stated.

The case of *Mitchell* v. *Campbell,* 72 So. 231, seems to be the case mostly relied upon by appellant's counsel. The doctrine announced in that case was nothing new or novel in this state. It has been frequently adhered to in previous cases, notably in the case of *Woodson* v. *Hopkins,* 85 Miss. 171, but, for reasons above explained, we respectfully submit that this case has no application because it does not fit the facts based on the pleadings in this case. Besides, this court, insofar as we can determine from its decisions, does not always adhere to the doctrine laid down in the Mitchell case. For instance, the same distinguished and able judge who delivered that opinion on July 8th, insofar as we are able to judge, decided another case on the same day, from the same bench, diametrically opposed to the doctrine announced in the Mitchell case. See *Aetna Insurance Company* v. *Heidelber,* 72 So. 470 and 72 So. 852.

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We therefore, respectfully submit that the action of the lower court was sound and correct, and that this case should be affirmed.

HOLDEN, J., delivered the opinion of the court.

This case is controlled by the rule announced by this court in *Mitchell* v. *Campbell*, 111 Miss. 806, 72 So. 231. The demurrer of the plaintiff below to the plea of the defendant alleging an illegal and void contract should have been overruled, as the plea presents a good defense to the action, and may be proven by oral testimony.

Reversed and remanded.

THOMASON v. BOARD OF SUPERVISORS OF LAWRENCE COUNTY.

[76 South. 267, Division A.]

1. HIGHWAYS. *Road tax. Liability for commutation.*

Under Code 1906, section 4442, declaring that if a public road be worked and kept up by contract the road hands designated by the board shall work under the contractor or pay commutation money to him; where the board of supervisors contracts for the working of roads, and designate and assign the road hands as required by this section and furnish to the contractor a correct and proper list of such road hands which is accepted by him, the work or commutation tax due by such hands "shall be estimated as a part of the whole of the contractor's renumeration according to the contract "and the contractor is chargeable with the work or commutation tax due by each road hand on the list, provided the board of supervisors had not by its own acts or conduct prevented the contractor from obtaining the work or collecting the commutation tax due from the hands; and provided, further, that the contractor could secure the work or collect the tax by reasonable effort and due diligence on his part, but where the contractor has performed his duty in good

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faith in the collection of the road duty or commutation tax, and has failed to make all of the collections on the list, then he would be entitled to credit for all the work or commutation tax that he failed to collect for any cause over which he had no control.

2. SAME.

The fact that the contractor accepts the list of hands and undertakes to collect the tax according to the list does not bind him for the full amount charged to him on the list unless he collects the same, or unless it appears that his failure to do so was his own fault or negligence.

APPEAL from the chancery court of Lawrence county. HON. R. E. SHEEHY, Chancellor.

Suit by M. H. Thomason, against the Board of Supervisors of Lawrence county. From a decree for defendant, plaintiff appeals.

In 1907 the board of supervisors of Lawrence county decided to work the public roads of said county by contract under provisions of sections 4441-4443 of the Code of 1906, and in November of said year entered into a contract with appellant to work said roads for a term of four years, for a price stipulated in the contract. The commutation tax was fixed at five dollars a year *per capita,* under the provisions of section 4442, and said tax might be commuted by ten day's labor on the roads. A list of road hands assigned under the provisions of this law each year was turned over to appellant, as contractor, and he was charged with the commutation tax due by each, and directed to collect same, or to require 10 days' labor on the roads in lieu thereof. At the expiration of the contract in 1911, upon making final settlement with the board, appellant claimed credit for a large amount of commutation taxes charged against him each year, and uncollected by him, and not commuted by the hands against whom charged. The board declined to give him credit for this amount and deducted same from his final settlement. He thereafter filed suit in the chancery court, praying a judgment for the

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amount alleged to be due him. The board of supervisors answered. denying liability, and the case was tried on bill and answer, and testimony taken in open court, and resulted in a decree dismissing the bill, from which this appeal is prosecuted.

Jno. H. Aarrington and *G. Wood Magee*, for appellant.

We say that all the proof shows Thomason did what he could to collect the tax and warn the hands; that the board acted arbitrarily and unfair in taking from his pay warrants these amounts of money; that the adjudication was wholly *ex parte* and that Thomason was and is in no way bound by the orders. The county by its board puts itself in the position of a man who owed a debt, but said to his creditor, "I won't pay you, because the man who owes me won't pay me. If you will go out and collect what is due me from those who owe me, I will let you keep that as pay." This is the defense the county is making in this case. Such a defense is preposterous, and such a defense as we have never heard put up seriously before in a case.

There can be no question about the complainant's right to a decree in this case, for the amount prayed for. It would be an injustice done the good name of the county to permit the county to get Thomason's work and money for nothing and to allow the county to arbitrarily take his money in the way it did, and we submit that the decree of the court below should be reversed on direct appeal and a judgment should be entered here for the amount asked for by appellant, to-wit: two thousand, four hundred and forty eight dollars and ninty-two cents and interest.

We find no authority of law permitting the appellee county to require appellant to become collector of the commutation road tax of the county, and the terms of the contract sued on in this case confers upon appellee

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county no authority to compel appellant to collect this tax. In fact, the board of supervisors of a county are powerless to designate any one as tax collector other than the person designated by law, and this person is the sheriff of the county. Section 4694, Code 1906, declares, "The sherriff of the county shall be tax collector therein," and the law of the state gives no other person the right to become tax collector nor can this duty be imposed upon any other person, even by order of the board of supervisors.

Then if appellee could not compel appellant to collect this tax by any law in force at the time, he could not be compelled to collect it by the terms of the contract sued on herein even tho the contract had embodied in it a provision to this effect, because appellee and appellant could not contract so as to abrogate or nullify the plain provisions of section 4694, Code 1906.

Another question might arise if the appellant had actually collected the money but he did not collect and for this reason he cannot be held liable for the tax and the board of supervisors had no authority to charge it and deduct it from his pay warrant for work performed and approved.

Now, as stated before, there is only one question for decision in this case, and that is, did appellee have a right to penalize, as it were the appellant for failing to do something which appellee thought he should have done. There is no question here about the appellant's failure to work and maintain the roads included in his contract according to plans and specifications. This question is eliminated absolutely because the members of the board acting as road commissioners for their respective districts reported all work, the pay for which is not in controversy in this case, up to plans and specifications. Nor is there any question here as to the time this work was done, nor as to the amount to be paid for same under the contract. In other words, every question is eliminated from this case except the

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right of the appellee to deduct from appellant's compensation for working the roads, under the contract, an amount of money which the appellee thought he should have collected from all delinquent road hands of the county.

And we submit with all confidence that the appellee had no warrant of law to withhold from appellant any of his compensation for working the roads, under the contract, an amount of money which the appellee thought he should have collected from all delinquent road hands of the county.

And we submit with all confidence that the appelllee had no warrant of law to withold from appellant any of his compensation for working the roads of the county merely because appellant, in appellee's opinion, should have collected certain commutation road taxes.

Luther E. Grice and *H. J. Wilson,* for appellee.

This is a suit by a county road contractor for the balance due him under his contract for constructing and maintaining the public roads. The burden was on the the complainant to show clearly that he had performed all of the conditions of the contract. This he failed to do, and the record does not show that he constructed and maintained the roads according to the plans and specifications under his contract.

Having failed in this respect he must go out of court and pay the costs. For this reason alone the chancellor was eminently correct in dismissing the case and taxing him with the costs.

With reference to the commutation tax, we beg to call the court's attention to section 4442 of the Code of 1906. This contract was let under this express provision of law. This contractor accepted the contract and was charged with a knowledge of the law and its duties thereunder. In the event the tax collector did not collect it, it was the duty of the road contractor to re-

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quire those subject to road duty to work or pay the commutation tax. It appears that the contractor recognized his duty in this respect and accepted as part of his duty the collection of the commutation tax. He accepted the list and collected from large numbers of persons. It seems that he made no objection to the board with reference to the collection of tax. But accepted this duty without complaint.

The law above referred to provides: "That such work and commutation shall be estimated as part or the whole of the contractor's remuneration according to the contract."

Each person subject to road duty was by order of the board required to pay six dollars commutation tax. The contractor in this case collected six dollars in a large number of cases, but reported the collection of only five dollars and was charged by the board with only five dollars. It was the duty of the board to charge him with the full amount collected. They could not excuse, remit or grant to him, any part of this tax, but it was their duty to charge him with the whole of it. It is undisputed that at the time of bringing this suit he had collected in this respect more than one thousand two hundred dollars, that he had not turned in, and had not been charged with. Not only this, but at the time he brought this suit it appears that he had collected and had in his possession, which he admits he was due the county, the sum of eight hundred and thirty dollars.

We maintain that the court should have required the complainant to account for all of the money collected by him as commutaton tax.

Furthermore the allegations of the cross-bill are not denied, and under the pleadings as disclosed by the record, it is clear that the court should have given a decree in favor of cross-complainant.

It occurs to us that the only errors made by the court were those made against the defendant and in favor of complainant. The proof offered by the com-

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plainant is insufficient to support a decree in his behalf. This court is bound by the case as disclosed by the record, here. Upon this record it is not clear that the court erred against complainant.

It is a rule of law too well settled in this court to require comment here that where the record does not clearly show error, then this court will not interfere with the decree or judgment appealed from. We submit that on the whole, the finding of the chancellor was as favorable for complainant as he could have possibly hoped for, and since the defendant did not file a cross appeal the decree should be affirmed.

HOLDEN, J., delivered the opinion of the court.

We think the chancellor below erred in his construction of section 4442, Code of 1906, with reference to the work required of road hands and the commutation tax mentioned therein.

We interpret the section to mean that, where a contract is let for the working and keeping up of the public roads, the road hands, properly designated and assigned by the board of supervisors, shall work under the contractor or pay the commutation money to him the same as if he were the duly appointed overseer of the county; and when the board of supervisors lets the contract and designates and assigns the road hands, as required by the section, and furnishes to the said contractor a correct and proper list of such road hands, which is accepted by the contractor, the work or the commutation tax due by such hands "shall be estimated as a part of the whole of the contractor's remuneration according to the contract;" and the contractor is chargeable with the work or commutation tax due by each road hand on the list, provided the board of supervisors has not by its own acts or conduct prevented the contractor from obtaining the work or collecting the commutation tax due from the hands; and provided, further, that the con-

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tractor could secure the work or collect the tax by reasonable effort and due diligence on his part under the statute. But where the contractor has performed his duty diligently and in good faith in the collection of the road duty or commutation tax, and has failed to make all of the collections on the list, then the contractor would be entitled to a credit for all of the work or cummutation tax that he failed to collect for any cause over which he had no control. The fact that the contractor accepts the list of hands and undertakes to collect the tax according to the list does not bind the contractor for the full amount charged to him on the list, unless he collects the same, or unless it appear that his failure to do so was his own fault or negligence.

The decree of the lower court is reversed, and the cause remanded.

Reversed and remanded.

GILFORD v. STATE.

[76 South. 279, Division A.]

BURGLARY. *Evidence. Sufficency.*

Where on a trial for burglary the evidence showed that a warehouse was robbed of certain groceries; that defendant had in his possession, groceries of the same description in large quantities a day or two after the storehouse was robbed; but there was no evidence that a lock had been broken or window raised, and the only testimony introduced by the state to show that the store had been robbed was that the porter of the warehouse testified that when he unlocked the warehouse at the usual time in the morning he noticed certain boxes had been broken open and a large part of the contents removed. This evidence was insufficient to establish a breaking and entering of the warehouse from which the articles were alleged to have been stolen.

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APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Sam Gilford was convicted of burglary and appeals.

The evidence showed that a warehouse in the city of Vicksburg was robbed of certain groceries; that appellant had in his possession groceries of the same description in large quantities a day or two after the storehouse was robbed. There was no evidence that a lock had been broken, or window raised. The only testimony introduced by the state to show that the store had been robbed was that the porter of the warehouse testified that when he unlocked the warehouse at the usual time in the morning, he noticed certain boxes had been broken open and a large part of the contents removed.

J. N. Piazza and *A. A. Chaney,* for appellant.

Burglary, as a common-law offense, is the breaking and entering a dwelling house in the nighttime for the purpose of committing a felony therein whether the felony is committed or not. The manner of entrance has not been changed by our statute. Section 1073, Code 1906, under which this indictment was drawn provides that: "Every person who shall be convicted of breaking and entering, in the daytime or night, any shop, store, booth, etc., shall be guilty of burglary and imprisoned in the penitentiary not more than seven years." Breaking and entering, therefore at common law and under our statute, is a necessary element of the crime. To convict one of burglary it is essential that the state shall prove, beyond a reasonable doubt, the *corpus delicti,* that is, that the offense charged in the indictment has been committed by some one, and then the fact and circumstances must be sufficient to convince a jury beyond a reasonable doubt that the offense was committed by the defendant. To prove the *corpus delicti* the evidence must be sufficient to show that there has been a breaking and entering, entering alone not being

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sufficient. Evidence which leaves a doubt or leaves it to conjecture as to the manner of entrance is not sufficient. *Ross* v. *State,* 42 So. 801; *Mathews* v. *State,* 18 So. 683.

In the trial of this case in the court below there was absolutely no evidence whatsoever that there had been a breaking and entering of the wareroom in question, and no evidence, in fact that proved an entry except the missing of the goods by the negro who opened the room on the morning in question. The negro carried a key to the place and it is much more reasonable to assume that he is the guilty party instead of this defendant.

The only evidence against this defendant is that he had some goods in his possession of a similar description to the goods missing from the wareroom. His contention is that some one whose name he gives delivered him the property. This testimony was not contradicted. But even tho he may have come in possession of the property illegally he cannot be punished for burglary unless it is shown that the place was actually burglarized by some one. *Harper* v. *State,* 71 Miss. 202; *Mathews* v. *State,* 61 Miss. 155.

Proof of possession by the defendant shortly after the burglary, if, in fact burglary is shown, of goods alleged to have been stolen, is to be considered by the jury. Such evidence, however, is not sufficient if the possession by defendant is otherwise reasonably explained, unless his explanation is shown to be false. Evidence of the possession of the stolen goods will not support a conviction for burglary unless the breaking and entering are clearly shown. 9 Corpus Juris, 1080 and annotations.

Frank Robenson, assistant attorney-general, for the state.

Section 1073, of the Code under which defendant was indicted, reads as follows: "Every person who shall

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be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building, ship, steamboat, flat-boat, or railroad car in which any goods, merchandise, or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering, in the day or nighttime, any building within the curtilage of a dwelling house, not joined to, immediately connected with, or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven years."

It was very seriously contended by counsel for appellant in their brief that there was no evidence of a breaking and entering and that the *corpus delicti* was not proven.

It is true that the State was unable to show just how an entrance was effected into the warehouse, but I submit that counsel are mistaken in their contention that a breaking and entering was not shown. The porter testified that when the door was locked on the night of the burglary that the shipment had not been disturbed and that when he opened the door the next morning he saw the broken and bursted case on the floor. This testimony shows that an entrance and breaking was actually made though the manner of its making was unknown to the state.

Counsel for appellant cite the case of *Ross* v. *State,* 42 So. 801, and *Matthews* v. *State,* 18, So. 683. The facts in the *Ross case* showed that the box car alleged to have been burglarized had remained open for two hours on the side track. There was an opportunity in that case for a larceny to have been committed and not a burglary, and this was the reason for the court's opinion in reversing the case. The Matthews citation seems to be a miscitation, the style of the case being *Prescott* v. *State.* It is not apparent from the record of

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this case that there was either a burglary or larceny and the court very properly reversed the case.

"A prisoner may be convicted of burglary on proof that the house was broken, that particular goods were stolen therefrom, and that the prisoner had possession of the goods shortly afterward, and wholly failed to account for his possession, if it in no way appear from the evidence how the prisoner came into possession of the goods otherwise than the burglary." *Harris* v. *State,* 61 Miss. 304. The possession of recently stolen property is a circumstance from which the jury may infer guilt. *Stokes* v. *State,* 58 Miss. 680; Monographic Note 12 L. R. A. (N. S.); *Smith* v. *State,* 62 Ga. 663; *Nevada* v. *Watkins,* 11 Nev. 30.

One in possession of stolen property has the burden of explaining his possession and in the absence of a satisfactory explanation, the recent possession of stolen property will justify a finding that the one in possession broke and entered the building from which the same was stolen. *State* v. *Raphael,* 123 Iowa, 452; *State* v. *Jennings,* 79 Iowa, 513; *State v. Williams,* 12 Iowa, 36; *State* v. *Brady,* 121 Iowa, 561; *State* v. *Brown,* 25 Iowa, 566.

The defendant's explanation of the stolen property was not accepted by the jury. I submit that this testimony together with the broken cases in the warehouse, is sufficient to support the verdict in the case, and that the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

The evidence is insufficient to establish a breaking and entering of the warehouse from which the articles here in question are alleged to have been stolen; consequently, appellant should not have been convicted of burglary.

Reversed and remanded.

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STRICKER ET AL. v. CODIFER.

[76 South. 346, Division B.]

EQUITY. *Dismissal at final hearing. Lack of parties.*

Where in a bill to apportion alluvion, the claimants to a part of it are not made parties, the court on appeal will dismiss the bill without prejudice.

APPEAL from the chancery court of Wilkinson county. HON. R. W. CUTRER, Chancellor.

ON SUGGESTION OF ERROR. MODIFIED AND DISMISSED.

For former report see 75 So. 385.

Appellants, who were complainants in the court below, filed a bill in chancery against appellee, the purpose of which was to obtain a decree of the chancery court apportioning the accretion which had formed in front of the property on the bank of the Mississippi river, so that they would have a water frontage on the new bed of the stream.

The bed of the Mississippi river had gradually receded, leaving a large acreage of accretions between the old bed of the stream and the new bed. The dividing line between the appellants and appellee was a line running from the old bank of the Mississippi river north fifty-five degrees east, and the land of appellee lay southeast of this line, and appellants' lay to the northwest, to a smaller stream known as Buffalo river, which ran through the accretions to the new bed of the Mississippi river. The dividing line, north fifty-five degrees east, extended, ran through the alluvion and reached the new bed of the Mississippi river just above the mouth of the Buffalo river.

Appellants sought to have the court enter a decree apportioning the alluvion west of the Buffalo river between appellants and appellee, so that each would have a proportionate frontage on the new bed of the Missis-

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sippi river, and appellants would not be forced to cross the Buffalo river in order to reach the new bed of the Mississippi river, as would be the case should the dividing line be held to be the extension of the line north fifty-five degrees east.

The chancellor entered a decree in which he found as a matter of law that the dividing line north fifty-five degrees east extended to the new bed of the Mississippi river should be the dividing line of the accretions, and apportioned the accretions between appellants and appellee without regard to the Buffalo river, which is a nonnavigable stream. The appellants appealed, and the supreme court affirmed the decree of the chancellor.

Afterwards, on suggestion of error filed by the appellants, attention was called to the fact that owners of the accretion west of the Buffalo river had not been made parties to the suit, and therefore the decree approtioning the alluvion west of the Buffalo river was void, since all parties in interest were not in court.

Ackland H. Jones, for appellants.

Ratliff & Kennedy, for appellee.

PER CURIAM.

This cause was affirmed without an opinion, and it now appears that the lines of the appellants, if extended in a straight line to the river, would cross Buffalo river, a small stream, and that the parties claiming the land beyond Buffalo river and between said stream and the Mississippi river were not parties to the suit, and their rights could not be adjudicated in their absence. The decree should be modified, so as to dismiss the bill without prejudice of the appellants to file a new or amended bill, making said parties not before the court on this appeal parties defendant to the bill.

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The former judgment will be modified to the extent of dismissing the bill without prejudice to the right of the appellants to file a new bill, bringing in all necessary parties.

So ordered.

RICHMOND PAPER CO. *v.* BRADLEY.

[75 South. 381, Division B.]

GUARANTY. *Offer and acceptance.*

Where a traveling salesman who received a commission on sales and was therefore pecuniarily interested in the acceptance of orders taken by him, not only recommended, to his house the acceptance of an order, but stated that as to all orders sent in, "I know they are all O. K. and any I sell I am willing to guarantee payments of their bill," and his employers extended the credit; in such case there was an acceptance of the offer to guarantee and the letter and the acceptance created the relationship of guarantor and guarantee.

APPEAL from the chancery court of Harrison county. HON. W. M. DENNY, JR., Chancellor.

Suit by Thomas L. Bradley against the Richmond Paper Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Russhing & Guice, for appellant.

White & Ford, for appellee.

COOK, P. J., delivered the opinion of the court.

The appellee is a traveling salesman and a resident of Biloxi, Miss. The appellant is a corporation domiciled

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at Richmond, Va., and is engaged in the business of selling paper, stationery, etc. Mr. Bradley filed a bill in the chancery court of Harrison county seeking to recover of and from the Richmond Paper Company the sum of two hundred and fifty dollars, claimed to be due him under his contract with said company as its traveling salesman. Without going into the details of the pleadings and the amended pleadings, suffice it to say that the paper company denied that it owed Mr. Bradley anything; that they had advanced him under the contract the sum of three hundred dollars and forty-four cents and Bradley had guaranteed that a bill sold by him to one Barker amounted to five hundred and fifty dollars and sixty-two cents; that this bill Barker had never paid; that Barker had been declared a bankrupt and no dividends had been paid.

The complainant, Mr. Bradley, demurred to the answer and cross-bill, upon the following grounds, viz.:

"(1) There is no equity in said amended cross-bill.

"(2) Because the alleged written guaranty referred to therein is not made a part of said amended cross-bill or referred to, and said allegation that complainant guaranteed the payment of the account is a mere conclusion.

"(3) Said amended cross-bill attempts to introduce a new cause of action different from that stated in the original bill and original cross-bill and seeks relief based on a transaction occurring and maturing after the filing of the original bill.

"(4) Said amended cross-bill shows on its face that alleged guaranty was made on June 24, 1914, that the Pensacolian Publishing Company was adjudicated a bankrupt on April 19, 1915, and the papers in the cause show the original bill was filed October 19, 1914, and the cause of action, if any, accrued to defendant only upon the bankruptcy of said Pensacolian Publishing Company.

"(5) For other causes to be shown on the hearing."

The demurrer was sustained, and the cause was then tried upon the bill and the answer thereto, which was, in effect, the general issue.

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So, the cause was tried upon the original bill and the evidence taken in support of same, and the affirmative relief sought by the answer and cross-bill was cut off. The evidence taken at the trial discloses that the defendant contended that their contract with Mr. Bradley was reduced to writing, in the form of a letter, and accepted by him. Mr. Bradley denied this, and the court evidently adopted Mr. Bradley's version of the contract, and entered a decree in his favor, from which this appeal is prosecuted.

We will not attempt to follow the meanderings of the trial, but will come directly to what we deem the crucial points involved in this appeal. The learned trial judge, in sustaining the demurrer to the affirmative defense, made in the answer and cross-bill, evidently thought that the plea of set-off involving the alleged guaranty of the bill sold to Barker was not in fact a guaranty, else he would have overruled the demurrer.

The alleged guaranty is reduced to writing and must be measured by its terms, not by the construction of the appellee. The letter written by Mr. Bradley is in these words:

"I am sending you orders for J. U. H. Barker, proprietor of the Pensacolian Pub. Co., whom I have been selling ever since he has been in business—seven-eighths of his goods and also gave him regular terms and he is good pay, meeting his obligations promptly, has owed both Whitaker and Hagan as high as eight hundred to one thousand dollars at one time and they will ship anything he wants. You need not hesitate to extend credit and all the orders I have so far sent in are old customers of mine, and I know they are all O. K., and any I sell I am willing to guarantee payments of their bill."

The appellee insists that the letter only expressed a willingness to guarantee the payment of the bills sold, and that it was not therefore a guaranty; it lacks finality. It will be noted that the writer not only recommended and

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advised the shipment, but went further and told about their reputation and habit of paying, but said, in effect, "I am so sure that the bill will be paid I am willing to guarantee its payment." Now, it seems to us the only thing left to be done to constitute a guaranty was for the paper company to accept the offer to guarantee, and that we think was done when the credit was extended.

It has been said:

"A mere request to extend credit to a third person does not create any liability in the nature of a guaranty on the part of the requesting party."

But to this statement is added:

"Little more, however, is required to evidence an intention so to be bound." 12 R. C. L. p. 1055, and cases there cited.

The facts are that the paper company, after the receipt of the letter, shipped the goods and extended the credit.

If there is any lack of definiteness about the intention of Mr. Bradley to bind himself to pay the bill in case the customer should fail to do so, the facts, we think, supply the deficiency. Mr. Bradley had an interest—a pecuniary interest—in the acceptance of the order. He would receive a commission on the sale. So, he was not merely recommending a customer of previous reputation for meeting his financial obligations, but offered to guarantee the payment of the bill, and his offer was accepted by the shipment of the goods.

The "little more" than a mere request to ship the goods and extend the credit was added, and, in our opinion, the letter and the acceptance of the order created the relationship of guarantor and guarantee.

Reversed and remanded.

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BOARD OF SUP'RS OF LAMAR COUNTY v. WARDEN AND BARRETT.

[75 South. 382, Division B.]

1. COURTS. *Jurisdiction. Estoppel.*

In a suit by road contractors against a county, where, under their contract, they were entitled to a certain compensation, the fact that the board of supervisors of the county erroneously estimated the amount due the contractors at too high a figure, did not estop the county from afterwards questioning the jurisdiction of the court to try the case on account of the amount really involved.

2. JUDGMENTS. *Jurisdiction. Amount involved.*

Where the maximum recovery to which plaintiff was entitled was one hundred and thirty-eight dollars the circuit court was without jurisdiction though the suit was brought for two hundred and ten dollars.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by Warden & Barrett against the board of supervisors of Lamar county. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Salter & Hathorn, for appellant.

Tally & Mayson, for appellee.

ETHRIDGE, J. delivered the opinion of the court.

Warden & Barrett were road contractors in district No. 5 of Lamar county, and filed a suit against the board of supervisors in the circuit court of said county, alleging that the board elected to work the public roads of the county by contract and resolved that the several beats should be let as a contractor's district, and that the plaintiffs were awarded the contract for working

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district No. 5 of the said county for a term of four years at one hundred and eight dollars per mile for first-class roads and ninety-eight dollars a mile for second-class roads, and that they would be paid forty per cent. of the said contract price the first year and eight and four-sevenths per cent. of the contract price each semiannual payment thereafter; that the first year they were paid in full. and that the second payment they were only paid six hundred and thirty dollars and seventy-one cents, and claim that eight hundred and forty dollars and ninety-four cents were due them on said contract. The contract was made an exhibit to the pleadings, and shows that the plaintiffs were awarded thirty-two miles at one hundred and eight dollars per mile amounting to three thousand four hundred and fifty-six dollars, and fifty-six and three-eights miles at ninety-eight dollars per mile, amounting to five thousand five hundred and thirty-two dollars and fifty cents, making a total contract of eight thousand nine hundred and seventy-nine dollars and fifty cents, and for the payment in suit they were to be allowed, if the road was up to specifications, eight and four-sevenths per cent. of this eight thousand nine hundred and seventy-nine dollars and fifty cents which would amount to seven hundred and sixty-eight dollars and ninety-five cents, on which amount it appears from the declaration they were paid six hundred and thirty dollars and seventy-one cents which would only leave one hundred and thirty-eight dollars and twenty-four cents, instead of two hundred and ten dollars and twenty-three cents, stated in the declaration. It appears that the board of supervisors in making the calculation of the amount that would be paid if the roads were up to specification, made a mistake as to the amount that would be due under this contract. In making the allowance of six hundred and thirty dollars and seventy-one cents, the board of supervisors intended, as shown by their entry on the minutes, for

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this allowance to be in full of the payment to be made at that time, reciting that the contractors had not complied with their contract fully.

We are met at the threshold of this case with the question of jurisdiction, the case having originated in the circuit court, and the amount is shown by the exhibit to the declaration to be less than the jurisdictional amount of the circuit court. It is insisted by the appellee that the board was estopped to deny that the amount still due was two hundred and ten dollars and twenty-three cents, because they had figured the amount to be eight hundred and forty dollars and ninety-four cents. There is no element of estoppel in this, because the plaintiffs were not prejudiced or misled by this mistake, and the recital of the board on its minutes as to the amount that would be due at that time would not vary the terms of the contract. It thus appears that the circuit court had no jurisdiction to adjudicate the differences between the litigants in this case and that the judgment entered by the court against the county for two hundred and ten dollars and twenty-three cents was without jurisdictional authority and void. See *Rich* v. *Calhoun,* 12 S. 707; *Griffin* v. *McDaniel,* 63 Miss. 121; *M. J. & K. C. R. Co.* v. *Hitt et al.,* 55 So. 484.

The court being without jurisdiction to render the judgment, we cannot decide the other question presented in the record.

The judgment is reversed, and the suit dismissed.

Reversed and dissmissed.

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ALDINGER v. STATE.

[75 South. 441, Division A.]

1. INTOXICATING LIQUORS. *Transporting liquors. Forfeiture of vehicles. Statute.*

Under Laws 1916, chapter 103, section 16, providing for the forfeiture of vehicles used in violating the liquor laws, this statute supplementing Code 1906, section 1750, providing that proof that the car was not used with the owner's knowledge or consent shall be a complete defense, where in a suit by the state for the forfeiture of a vehicle used in transporting intoxicating liquors, the undisputed facts showed that neither the taxicab owner, nor chauffer knew that a passenger was using the car to transport intoxicating liquors and that the owner had not been negligent in employing the chauffer and had directed him not to use the car for such illegal purposes, in such case the court could not order the car forfeited and destroyed.

2. VIOLATION OF LIQUORS LAWS. *Transportation. Presumption of knowledge.*

The fact that an automobile is used by a passenger for the unlawful transportation of intoxicating liquors makes out a *prima-facie* case of the guilty knowledge of the owner of the vehicle, which may however be rebutted by proven facts in the case.

APPEAL from the circuit court of Panola county.

HON. E. D. DINKINS, Judge.

Suit by the state of Mississippi against John H. Aldinger for the forfeiture of a vehicle used in transporting intoxicating liquors. From a judgment of forfeiture, defendant appeals.

The facts are fully stated in the opinion of the court.

Ed. G. Bell and *J. B. Carothers,* for appellant.

Frank Roberson, Assistant Attorney-General, for appellee.

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SYKES, J., delivered the opinion of the court.

This is a suit involving the question of whether or not under chapter 103 of the Laws of 1916 the circuit court has the power to subject to forfeiture and destruction a Cadillac automobile owned by the appellant, John H. Aldinger, under the following agreed statement of facts, viz.:

"It is agreed by the undersigned attorneys, as representatives of the state of Mississippi and J. H. Aldinger in cause No. 1039 in the circuit court of the Second court district of Panola county, Miss., that the said cause may be heard by Judge E. D. Dinkins in vacation at Batesville, Miss., on August 7, 1916, and that an appeal may be prosecuted, if desired, to the supreme court under the same conditions, etc., as if same was heard at regular term time; that the same may be heard by the said judge and decision made by him, hereby waiving a jury; and that the following statement of facts are the true facts of the cause, and shall be taken and accepted by the court as the facts as fully as if sworn to by witnesses herein:

"That J. H. Aldinger is the true and only owner of the seven passenger Cadillac automobile in this cause, and was the true and only owner on July 2, 1916, on the day and the date same left Memphis, Tenn., for Batesville, Miss., with J. R. Summers as a passenger, with Lee Anthony and his helper as drivers of said car; that upon receipt of a telephone call to garage in which said J. H. Aldinger stored his cars, and in his absence and without his knowledge, the said Anthony, who was the regular driver of said car and authorized to hire same, took the said car and went to the Arkansas Supply Company, a wholesale liquor house, for the passenger, J. R. Summers, for Batesville, Miss.; that the porter at said Arkansas Supply Company, a wholesale liquor house, and which was known by said Anthony to be a wholesale liquor house, loaded several packages in said car; that

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said Anthony and his helper did not then know that said packages, consisting of six cases of whisky, each containing twenty-four quarts, were whisky, nor did they absolutely know that same was whisky until they reached Coldwater, Miss., when they were told by said Summers that the same contained whisky; that the said car proceeded from Memphis, Tenn., to Batesville, Miss., with said Summers as passenger.

"That said Summers, who was taken as a passenger, contracted and agreed to pay for the use of said car the sum of two dollars per hour for the use of said car for said trip; that the car in controversy in this cause had never before transported any liquor in violation of law, nor had it ever been used in a violation of the laws of the state of Mississippi in other way; that the said J. H. Aldinger did not know that the car had so been used, and was not aware that said car was not in the city of Memphis until a telephone call from Batesville, Miss., by Lee Anthony, advising him that he was in jail charged with a violation of the state law, but, on the contrary, the said Aldinger had given positive instructions to said Lee Anthony and his helper never to use said car in transporting liquors into Mississippi or in violation of any law of said state; that the said car had been used in the taxicab business, and was being so used on the day same left Memphis, Tenn., for Batesville, Miss.; that the said J. H. Aldinger was not in any way connected with the Arkansas Supply Company, or any other liquor house, and did not know J. R. Summers at all, and had never had any dealings with him at all.

"That the said automobile is of the standard pattern of seven passenger Cadillac automobile of its model, and is of no evidential value, and is not held as evidence in any lawsuit pending in any court, or contemplated in any court. That when said Anthony reached Batesville, with the passenger and the said whisky, he drove said car on a residence street for the purpose of giving Summers an opportunity to unload said whisky, and said

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whisky was unloaded by Summers secreted in some weeds near the said street. That Anthony had started to public square of said town, but was persuaded by Summers to go to the point where the whisky was unloaded. Anthony was a stranger in Batesville, and knew nothing of the location. Anthony did not assist in unloading the whisky and secreting same.

"Petition for reference to the people of act of February 16, 1916, known as 'Weakly Bill,' I. & B. No. 264, filed July 7, 1916. That the value of the car in controversy is five hundred dollars."

In addition to this agreed statement of facts, it was proven that J. R. Summers pleaded guilty in the mayor's court and paid fines to the town of Batesville and to the state of Mississippi for transporting and delivering whisky into the town and state. No order for the forfeiture and destruction of the automobile was entered by the mayor. After the above fines had been assessed against the defendant Summers, the district attorney filed in the circuit court of the proper district of Panola county a petition in substance alleging that this automobile, at that time in the possession of the constable, had been seized by him from the defendant Summers and from its driver, and had been used by them in the unlawful transportation into the state of alcoholic liquors. The petition then prayed that the automobile be declared forfeited to the state of Mississippi and dealt with according to law. The appellant filed an affidavit under section 1750 of the Code of 1906 as to his ownership of the automobile, and also made oath that it was not at any time used with his knowledge or consent in connection with any keeping, disposition, or transportation of intoxicating liquors, in violation of the laws of Mississippi. By agreement of counsel the case was tried in vacation before the circuit judge, who rendered judgment declaring the automobile forfeited to the state and ordering its destruction. From this judgment this appeal is prosecuted.

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It is here claimed on behalf of the state that the judgment of the lower court is correct under section 16 of the above chapter of the Laws of 1916. This section reads as follows:

"That no property rights of any kind shall exist in the liquors mentioned in section 1 of this act, or in any other liquors, liquids, bitters or drinks prohibited by the laws of this state to be manufactured, sold, bartered, or otherwise disposed of in this state, or in any vessels, fixtures, furniture, implements, or vehicles, when the said liquors or other property mentioned are kept stored or used for the purposes of violating any law of this state; nor in any such liquors, bitters and drinks when received, possessed, kept or stored at any forbidden place, or anywhere in a quantity or quantities forbidden by law; and in all such cases the liquors, bitters and drinks aforesaid, and said property herein named, are forfeited to the state of Mississippi, and may be seized, or searched for and seized, under the laws of this state, and ordered to be destroyed in the manner and under the rules prescribed by law respecting contraband liquors, or by order of the judge or court after a conviction, when such liquors or property as described hereinabove have been seized for use as evidence."

It is to be noted that no point was raised in the court below or is raised here by counsel for appellant that under the above section the only court which had jurisdiction to declare this forfeiture was the court which tried the defendant Summers and under whose process the automobile was seized.

Neither is it necessary for us to pass upon the question as to whether or not a court could order this property forfeited after conviction when the property had not been seized for use as evidence in the case. Apellant files two assignments of error in this court:

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First, "the honorable court erred in ordering the claimant's automobile to be distroyed, under the undisputed facts in the case. Second, the honorable circuit court erred in finding that the automobile was used for the purpose of violating the law, as the term 'used' is mentioned in the laws of the state of Mississippi upon which this proceeding was filed."

It is only necessary for us to pass upon the first assignment of error, because of the fact that we think that the same is well taken. Section 31 of the act here in question provides:

"That this is a supplemental act and does not constitute a complete revision of the laws upon the subject matter involved."

Section 1750 of the Code of 1906 provides, among other things, that any person who claims vessels or appliances seized shall make affidavit as to his ownership, and also of the further fact that they were not used with his knowledge or consent in connection with the violation of the intoxicating liquor law. Section 16 of the act of 1916 provides in part that certain property is forfeited to the state and may be seized, "and may be destroyed in the manner and under the rules prescribed by law respecting contraband liquors." This clearly refers to section 1750 of the Code of 1906, and under this section of the Code it is a complete defense to the proceeding for forfeiture of the property when the owner proves that it was not used with his knowledge or consent in connection with the violation of the law. The agreed statement of facts shows that the appellant here was absolutely innocent of the fact that his automobile was being used by a passenger in transporting liquors into Mississippi in violation of the prohibition laws. It does not show that there was any negligence on the part of the owner of this automobile, either in the hiring of the chauffeur of the same or in the manner that he conducted his taxicab business in Memphis, Tenn. But the statement of facts conclu-

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sively negatives any negligence on his part. In fact, it shows that he had given his chauffeur specific instructions not to violate the liquor laws of Mississippi, and that the chauffeur did not know the contents of the packages which were being carried by this passenger until after they reached Coldwater, Miss.

We think that the fact that the automobile was used by the passenger for this unlawful purpose makes out a *prima-facia* case of the guilty knowledge of the owner of the vehicle; but this was completely rebutted by the agreed statement of facts in the case. The United States revenue statutes are quite similar in effect to the law here under discussion. This question was well considered in the case of *United States* v. *Two Barrels of Whiskey et al.*, reported in 96 Fed. 479, 37 C. C. A. 518. The following quotation from that opinion very well expresses our view on this subject:

"It is admitted that Harvey Latham is innocent of any intention to violate the revenue law, and that his property was in the possession of Oliver Deaton without his knowledge or consent, and the question is whether the mere accident of its situation can give it a criminal character independent of its owners' fault, and thus subject it to the extreme penalty of forfeiture. Guilty knowledge or evil intent is not a necessary ingredient in statutory offenses, and the maxim that crime proceeds only from a criminal mind has no controlling effect in limiting the operation of statutory penalties to those only who consciously violate the law. There being an undoubted competency in the lawmaker to declare certain acts criminal irrespective of the motive, these investigations are limited to a judicial ascertainment of the mind of the legislature without inquiry into the mind or motive of the doer of the thing inhibited. Says Mr. Justice GRAY in *U. S.* v. *Stowell*, 133 U. S. 12, 10 Sup. Ct. 245, 33 L. Ed. 555: 'By the now settled doctrine of our court, statutes to prevent frauds upon the revenue are considered as enacted for the public

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good, and to supress the public wrong, and therefore, although they impose penalties and forfeitures, not to be construed like penal laws generally in favor of the defendant, but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.'

"Penalties and forfeitures, although generally the consequences of crime or guilt, do not necessarily imply the one or the other. As the forfeiture of a man's property is one of the severest punishments that the law can inflict, the mind is naturally perplexed by two considerations of directly opposing tendency—the one being the principle of natural justice, which revolts at the punishment of the innocent; the other, the apparent necessity of doing that very thing, in view of public policy, in order to prevent those shifts and subterfuges by which the revenue laws are evaded. The statute must be clear and unequivocal which imposes upon a court the duty of punishing one man for the fault of another. The object of section 3450 is to punish all persons who, with intent to defraud the government of the tax, remove or conceal goods upon which the tax has not been paid, and, in addition to the punishment of such persons, it provides that all conveyances and animals used in the accomplishment of this unlawful purpose shall be forfeited. Undoubtedly, there is a presumption against any one whose property is found employed in this unlawful business that it is so engaged with his consent, but can it be that this presumption is irrebuttable?

"The contention of the government is that, this being a proceeding *in rem*, it is the guilty thing that has offended, and that this is to be forfeited, irrespective of any participation of its owner. If this team and wagon had been stolen from the owner, it would be clearly unjust, unreasonable, and preposterous to forfeit it because it was used by the wrongdoer in the transportation of illicit liquor. If this exception is admitted, it would follow that property has no guilty character, except as connected

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with persons who have charge of it, and the result is that it is the duty of the court to inquire into the facts, and, if it appears clearly that the owner has not hired or loaned it to another for an unlawful purpose, or knowingly permitted it to be in the possession of a party likely to engage in an unlawful business, or negligently suffered it to be controlled by a stranger, whose character gave no assurance that it would not be unlawfully employed, or is in some way justly chargeable with blame or negligence, he ought not to suffer the sweeping condemnation that justly falls upon those who consciously violate the law, and upon those upon whom is laid the duty of vigilance, and who negligently or otherwise fail in that duty."

A number of authorities are quoted in the above case; among others there are several relied upon by the state in this appeal.

Reversed, and judgment here for the appellant.

Reversed.

PICKLE v. RECEIVER OF ST. LOUIS AND SAN FRANCISCO RY. CO.

[75 South. 448, Division B.]

CARRIERS. *Notice of loss. Question for jury.*

Where under a bill of lading, making it a condition precedent to a recovery of damages for loss in shipment of stock, that the shipper give notice in writing of his claim to a general officer or the nearest local station agent, the shipper orally notified the station agent, who wrote out the claim, but the shipper himself was not quite positive that the written claim was made, though he testified, as his best recollection that it was reduced to writing, in such case it was a question for the jury as to whether the stipulation was complied with.

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APPEAL from the circuit court of Monroe county.

HON. CLAUDE CLAYTON, Judge.

Suit by George W. Pickle against the receiver of the St. Louis & San Francisco Railroad Company. From a judgment on a peremptory instruction for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Leftwich & Tubb, for appellant.

Geo. T. Mitchell, for appellee.

COOK, P. J., delivered the opinion of the court.

Mr. Pickle, the appellant, sued the appellee railway company for alleged damages to a shipment of horses. When the shipment arrived at the destination, the station agent was notified of the injury to the horses, and he promised to look them over and send in a claim to the company. The next day, or a day or so thereafter, he did look at the stock and informed the owner that he would prepare the claim, and that he did write out the claim, but the owner was uncertain as to his signing the paper. This was substantially the evidence in the trial of the case. Upon the motion of the defendant, the trial judge directed the jury to return a verdict for the defendant.

The bill of lading contained the usual stipulation to the effect that:

"As a condition precedent to recovery of damages for any death, loss or injury or the delay of the live stock the shipper shall give notice in writing of his claim to some general officer of the company or the nearest station agent, etc., . . . and a failure to comply with this condition shall be a bar to the recovery of any damages for such death, loss, injury or delay."

In this case, the station agent was notified of the injury to the stock, and he promised to make out the

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claim, and did write out the claim. The shipper was not quite positive that the written claim was made, but he stated, as his best recollection, that it was reduced to writing.

We think this was a case for the jury and falls within the rule announced in *N. O. & N. E. Ry. Co.* v. *Wood,* 73 So. 615.

Reversed and remanded.

PALATINE INSURANCE COMPANY *v.* SMITH MCKINNON & SON.

[75 South. 564, Division B.]

INSURANCE. *Fire insurance. Additional insurance clause. Waiver.*

A provision in a fire insurance policy that it should be void if insured should procure any other insurance on the property in excess of one thousand dollars, is not waived by the insurer's agent offering insured an additional policy of another company for a greater amount than permitted by the first policy, where neither the insurer nor the agent knew that additional insurance had been taken out by insured after the fire, and insured was fully aware that he was bound by his contract.

APPEAL from the circuit court of Choctaw county.

HON. H. H. RODGERS, Judge.

Suit by Smith McKinnon & Son against the Palatine Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McLaurin & Arminstead, for appellant.

The provision in the contract sued on and pleaded in this case "that the entire policy, unless otherwise provided by agreement endorsed hereon or added hereto,

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shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy," is a part of the contract sued on, and valid by all the decisions of all the courts that we have seen, including the Mississippi courts, and is effective to defeat a recovery on the policy, unless it has been in some manner waived by the general agent of the insurance company, as will appear from the authorities hereafter discussed.

Counsel for appellees in their suggestion of error fail to call the court's attention to the two lines of decisions on what is the duty of an agent of an insurance company when he comes into possession of knowledge that an assured is violating his policy, and counsel also failed to call the court's attention to what constitutes a waiver at the time of the issuance of the policy, and what are the rights of the respective parties to the contract after the issuance of the policy. Some courts hold that if the general agent of the insurance company who issued the policy and had power to make the contract is advised that an assured has violated his policy, that it becomes the duty of such agent to cancel his policy or the forfeiture will be waived. Such is the line of decisions from which counsel for appellees state the case of *Westchester Fire Insurance Co.* v. *Earl*, 33 Mich. 149. A great number of courts, including the Mississippi court, take an opposite view, and hold that if at the time the policy is issued the general agent of the insurance company having power to make the contract is advised of facts different from the requirements of the insurance contract; that requirement of the contract issued will be waived, but after the policy has been issued, Mississippi, with a great number of courts holds that it is not the duty of the insurance company to see that an assured does not violate his contract; in other words, all the duty of preserving the rights of the re-

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spective parties to the insurance contract does not rest alone on the insurance company; that the insurance company is not the guardian of its policyholder, that the same law applies to the policyholder that applies to the insurance company.

The case of *Insurance Company* v. *Scales,* 71 Miss. at the bottom of page 780, the court passing on the question of whether or not the knowledge of the general agent of the company that a house insured by his agent had become unoccupied after the issuance of the policy required such agent to cancel his policy or waive the forfeiture, as was held in the *Earl case* cited in the suggestion of error, 33 Mich. 149, held exactly to the contrary, and said:

"The company was not bound to notify the insured of the unoccupied condition of the house, if it actually knew. There was silence, and that is never ground for estoppel, except where it is a fraud, which cannot be predicated of this silence. The agent had a right to be silent and give no notice as to the unoccupied condition of the house. It was no part of his business as agent of the company to keep policies from being avoided by a violation of their conditions whatever obligations he may have assumed by his engagement to the assured, as to which engagements he could not bind the insurers."

This case clearly distinguishes Mississippi's rule of law from the *Earl case,* in 33 Mich. cited by counsel in their suggestion of error. Again the supreme court of Mississippi in *Insurance Association* v. *Matthews,* 65 Miss. 313, opinion by Judge CAMPBELL, said:

"If the court can affirm confidently that the assured should not, as a reasonable person, have been misled, it is not left to the jury; it should be decided by the court. Where it appears that the insured was not misled, all idea of waiver is excluded."

Waiver has been defined by the supreme court of Mississippi, in the case of *K. of P.* v. *Quin,* 78 Miss. 525-531, as follows:

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"A waiver is defined to be the intentional relinquishment of a known right and it implies an election of the party to forego some advantage he might have at his option insisted upon. There must be both knowledge of the existence of the right and an intention to relinquish it."

Now, we ask the court, in view of these definitions, how in the name of high heaven could it be insisted that this man McKinnon, who testified at the bottom of page 20 of the record and the top of page 21 that he did not claim that McWhorter had any knowledge of this additional insurance, and he would not swear that he had any such knowledge, that McWhorter could, under that state of fact, have waived something he didn't know anything about? In support of the holding in the *Scales case,* 71 Miss. *supra,* we cite the court to the case of *Petit et al.* v. *German Insurance Company,* 98 Fed. 800 and at page 803. *Fisher* v. *London L. & Fire Insurance Company,* 83 Federal, at page 807; *Insurance Co.* v. *Gunter,* 116 U. S. 113; *West End Hotel & Land Company* v. *American Fire Insurance Company of New York,* 74 Fed. 117-118; *Imperial Fire Insurance Company* v. *Coos County,* 115 U. S. 462, 14 Sup. Ct. 397; *Phoenix Insurance Company* v. *Dorsey,* 102 Miss. 87; *pany,* 16 Peters, 495 at page 510.

But, be these considerations as they may, we see no *Carpenter* v. *Providence-Washington Insurance Com-* reason, why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured had no right to complain, for he asserts to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement and yet to

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bind the other party to obligations which but for those stipulations, would not have been entered into.

J. M. Vardaman, for appellee.

The main contention of counsel for appellant in this case is that this policy was avoided when appellees took out the additional insurance in the Home Insurance Company and that there was no waiver on the part of the agent for the Palatine Insurance Company (appellant here) of this prohibitory clause. The two principal witnesses on the question of waiver are McKinnon, one of the plaintiffs in this case, and McWhorter, agent for the defendant company. McKinnon testifies that McWhorter had written him some other insurance and that he returned the policies to him, stating that he was going to give his insurance business to Gladney. McWhorter, it seems, had written plaintiffs twenty-five hundred dollars additional insurance on their stock of goods and when they attempted to deliver the policy, plaintiffs advised them that they had taken the same insurance with Mr. Gladrey, to which McWhorter tacitly agreed. From the evidence in this case it appears that McWhorter, the agent for the appellant, had written an additional policy on the stock of goods of appellees for twenty-five hundred dollars, but that same had been cancelled by appellee Surely, if this policy had been the additional insurance in force instead of the Home policy, appellant would not raise this question, since their agent had written the adtional insurance. After McWhorter had written this policy and appellees had advised him that they had given this insurance to another agent and he had agreed to such action on their part, we respectfully submit that the actions of the agent McWhorter are such as to constitute a waiver of the clause prohibiting additional insurance. The witness McKinnon states that he did not, in exact words, tell McWhorter all the details of procuring the insurance, the policy number, etc., but the conversation was

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such that a reasonable man would believe that he knew of the additional insurance and consented to it. When McWhorter testified he stated that he did not remember the conversation as testified to by McKinnon but that he would not swear that it did not occur.

We submit that the action of the agent McWhorter in offering to write an additional twenty-five hundred dollar insurance on the stock of goods of appellee and his conversation with the appellee McKinnon regarding the insurance was such as to constitute a waiver of the clause in the policy prohibiting the additional insurance. We submit that the question as to whether or not there had been a waiver of this clause was a question to be determined by the jury, and it having been left to the jury for their decision, that their verdict cannot be disturbed. There is no question here as to the goods being worth the amount of the verdict, and we most respectfully submit that the appellant cannot be heard to complain simply because the verdict is not in its favor. We ask that the case be affirmed.

COOK, P. J., delivered the opinion of the court.

This is a suit instituted in the circuit court of Choctaw county by Smith, McKinnon & Son against the Palatine Insurance Company on an insurance policy issued on the 21st day of October, 1914, and running for one year, to the 21st day of October, 1915, for the sum of fifteen hundred dollars. This policy was issued by M. C. McWhorter & Co., agents of the Palatine Insurance Company at Ackerman, Miss. It contained permission in the face of the policy for the assured to have additional insurance of one thousand dollars. The policy being for fifteen hundred dollars, it permitted the assured to carry insurance up to twenty-five hundred dollars. The policy contained the iron-safe clause and the warranty to take inventories and keep books and produce them after the fire. The defendant insurance company filed a plea of the general issue and notice thereunder, in which it set up the defense

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that the plaintiffs in the court below (appellees here) had violated the iron-safe clause attached to the policy, and that they had also violated the provisions of the policy contained in lines 11 to 13, inclusive, which provided that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy."

And defendant further gave notice that the policy sued on for fifteen hundred dollars, covering on appellee's stock of goods, was dated the 21st day of October, 1914, and ran for one year, to the 21st day of October, 1915, and that the plaintiff, in violation of the express provisions set forth in the policy sued on, on the 23d day of January, 1915, and during the life of the policy sued on, obtained from the Home Insurance Company of New York its policy No. 46 for the sum of twenty-five hundred dollars, covering on the same stock of goods insured by this appellant, which insurance of twenty-five hundred dollars the appellant's policy expressly prohibited, whereby the terms of the policy sued on became void. In reply to this notice, the appellees (plaintiffs below) filed a counter notice in which it was alleged that the policy for twenty-five hundred dollars, taken out in the Home Insurance Company of New York as additional insurance was done with the consent of the appellant, and that thereby the appellant had waived the right to object to the same.

We will discuss but one point in this case, as a decision upon that point will dispose of this appeal.

The contract between the parties provides that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy."

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It is admitted that the insured procured another contract of insurance upon the property covered by this policy, and that no agreement for such additional insurance was indorsed on the policy. The additional insurance procured amounted to twenty-five hundred dollars, while the policy sued on permitted only one thousand dollars additional insurance. The policy sued on was written by Mr. McWhorter, the agent of the company at Ackerman, and the additional insurance was written by Mr. Gladney, the agent at Weir of the Home Insurance Company of New York. The plaintiff in the trial court seems to have proceeded upon the theory that Mr. Gladney, who wrote the additional insurance, was also the agent of the Palatine Company, defendant below. As a matter of fact, however, Mr. Gladney was not the agent of the defendant company. It appears that Mr. McWhorter, the agent of the defendant, had issued additional policies upon the same stock of goods and mailed same to the insured; that the additional insurance so written by Mr. McWhorter were contracts of insurance by other companies represented by McWhorter, and not the defendant company. The policy so tendered by McWhorter was for three thousand dollars, while the policy in this suit permitted only one thousand dollars additional insurance.

The insured returned the policy for additional insurance to McWhorter, declining to accept same. The insured testified that when he returned the policy he told Mr. McWhorter that Mr. Gladney lived at Weir, his home town, and he had promised to give him some of his business.

The record does not disclose that Mr. McWhorter knew the amount of the policy written by Mr. Gladney; but it does show, we think, that Mr. McWhorter was advised that the insured intended to secure additional insurance from Gladney, and that McWhorter did not raise any objection to it—he was silent so far as the record shows.

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As we understand the contention of appellee, it is about this: That McWhorter, the agent of the company, had, as the agent of other insurance companies, tendered to appellee an insurance policy for twenty-five hundred dollars, additional insurance; that he was then informed that the insured was going to give Mr. Gladney some of his business, and said then that he did not blame the insured. From this, appellee insists that appellant, through its agent, waived the additional insurance in excess of the amount stipulated in the policy; that the action of its agent, acting for other underwriters, had offered the excess additional insurance; and that he thereby estopped the appellant from claiming the forfeiture.

It is not claimed that McWhorter knew anything about the policy written by Gladney. It is claimed that he was notified that the insured was going to give Gladney some of his business; and, inasmuch as McWhorter had offered to write the additional insurance, appellant is estopped to claim the forfeiture.

Suppose we say that McWhorter was informed, after the event, that the policy in question had been written by Gladney, and that he did not notify the insured that he had forfeited his policy, would his silence work an estoppel against appellant? It seems very doubtful.

To sustain the plea of waiver or estoppel in this case, we will have to go much further. McWhorter was not acting for appellant when he tendered the additional insurance but we can see some reason for saying that, had the insured accepted the contract tendered, appellant would be estopped to plead a forfeiture; but it does not appear that McWhorter was advised of the excess additional insurance, but quite the contrary. It seems evident that the insured has forfeited his contract, through ignorance, no doubt; but it would be going far to destroy the obligations of plainly written contracts upon a slender thread of imputation of knowledge and a supposititious

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duty on the part of one party to a contract to carefully supervise the action of the other party to the contract.

Did Mr. McWhorter waive the additional insurance clause by offering the insured a policy of another company for a greater amount than permitted by contract? We think not.

Did the policy tendered by McWhorter and refused by the insured create an implied waiver of the limited additional insurance clause? We think not.

The evidence does not show that appellant or its agent knew that any insurance had been taken out by appellee, other than the policy sued on, until ater the fire.

Lastly, appellee was evidently fully aware that he was bound by his contract, and he asked Mr. Gladney to notify Mr. McWhorter of the policy written by Gladney. Gladney failed to notify McWhorter.

Reversed and dismissed.

BIG CREEK DRUG CO. *v.* STUYVESANT INSURANCE COMPANY.

[75 South. 768, Division B.]

INSURANCE. *Forfeiture of fire policy. Estoppel. Knowledge of agent.*

An insurer is bound by its agent's knowledge, and is estopped from claiming a forfeiture of a policy where its agent who solicited a renewal of a fire insurance policy, inspected the risk, receipted for the premium, and delivered the policy, had knowledge that the insured did not keep an iron safe as stipulated for in the policy, similar conditions having existed in the case of the previous policy and in such case it was immaterial whether the agent was a soliciting agent or a general agent of his company, since he was the only agent with whom the insured dealt.

APPEAL from the circuit court of Calhoun county.

HON. J. L. BATES, Judge.

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Suit by Big Creek Drug Company against the Stuyvesant Insurance Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Dunn & Patterson and *Vardaman & Vardaman,* for appellant.

McLaurin & Armistead, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellants, W. H. Taylor and John Denley, are partners in trade, doing business under the firm name of Big Creek Drug Company. They instituted this suit against the appellee, Stuyvesant Insurance Company, on a policy of fire insurance covering a stock of goods in their storehouse in the village of Big Creek, Calhoun county. The defendant in its notice under the plea of general issue alleged a forfeiture based on the iron-safe clause. The plaintiffs replied to this special notice by alleging that the provisions of the iron-safe clause were waived by the defendant company at the time the risk was solicited and the policy delivered. On the trial of the case, it appeared that one E. F. Dezonia, Jr., inspected the risk and took the application for the insurance, and did this as an agent of the Home Mutual Insurance Company. The written application was forwarded to J. F. Chambers, agent, at Corinth, Miss. It appears that Mr. Chambers was the general state agent of the Home Mutual, and that his company, on receiving the application, preferred that other companies share the risk, and accordingly had the Stuyvesant Insurance Company and the German Fire Insurance Company each to issue a policy to the Big Creek Drug Company for and in the sum of one thousand dollars, the Home Mutual at the same time issuing a policy for one thou-

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sand dollars. The policy issued by the Home Mutual Fire Insurance Company was countersigned by Moore & Chambers; while each of the other two policies, in the Stuyvesant Company and the German Fire Company, respectively, was countersigned by J. F. Chambers, agent at Corinth, Miss. The testimony of Mr. Taylor, one of the partners, shows that his company had taken out insurance in the Home Mutual a year before the policy sued on was issued. When the first policy expired, Dezonia solicited a renewal. At the time the renewal policy was solicited Mr. Taylor, according to his testimony, told the agent that he did not have an iron safe and did not expect to keep one; that he kept his books in what is known as a "McCaskey Register." Witness further says that Mr. Dezonia looked over the stock and examined the system of bookkeeping; that the first time he took insurance the agent asked him if he had an iron safe, and witness advised him that he did not; that the agent assured him that his failure to keep an iron safe would not stand in the way of a policy being written, the agent saying "that didn't make any difference;" that "it wasn't necessary." Mr. Taylor further says that Dezonia is the only agent who came to Big Creek or there solicited insurance for the Home Mutual Insurance Company; that Dezonia took applications, collected premiums, accepted promissory notes in settlement of premiums, inspected all risks, delivered policies, and, after loss, attended to the furnishing of proof of loss and having an adjuster to come and figure on the amount or extent of the loss. It appears that the adjuster, before he consented to figure on the amount of the loss, required Mr. Taylor to sign a non-waiver agreement. During the course of the examination of Mr. Taylor as a witness, the trial judge excluded his evidence in reference to a waiver, upon the ground that Taylor was bound to have known that Dezonia was

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a mere soliciting agent because the application for the insurance was forwarded to the general office of the company and policies there countersigned and issued. After this ruling of the trial judge, counsel for the plaintiffs offered to prove that Dezonia wrote other merchants in Big Creek; that he represented himself to be a general agent; that sometimes he received applications and sometimes delivered policies without taking any written applications; that he collected premiums from other merchants, and delivered policies; that he at one time appointed a subagent for his company in that territory, and that in all these instances policies were not countersigned by Dezonia, but were issued at Corinth. Plaintiffs offered to introduced Mr. Cruthirds, Mr. Terry, Mr. Williamson, and Mr. Provine. The defendant objected to this line of testimony, and the court sustained the objection. It appears that in the written application which appellants signed, the written warranties at the bottom of the page, providing that representations made by the agent should not bind the company, were erased by Mr. Dezonia; and there is some evidence, also, to the effect that the written application was not signed at the place provided for the signature, but that on the back of the application was a diagram of the premises, which appellants did sign. Mr. Taylor also testified that when he went to sign the written application, the agent assured him it was not necessary to read over all the provisions; that everything was stated in the application as agreed upon. The testimony further shows that all correspondence which appellants had in reference to the insurance was conducted with Mr. Dezonia. The court excluded the plaintiff's testimony and directed a verdict for the defendant, and from the judgment entered in pursuance of this instruction appellants appeal.

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It makes no difference whether Dezonia was a soliciting agent or a general agent of his company. The testimony undisputably shows that he was the only agent who solicited the insuranc, inspected the risk, accepted the application, receipted for the premium, and delivered the policy. In this case he accepted a premium note, which was afterwards deposited for collection in the Bank of Grenada and paid by appellants. This agent, in accepting the business, was fully advised that appellants did not have an iron safe and did not expect to keep one. The proof shows that the company had accepted a previous policy under similar conditions, and took this renewal with full knowledge that there was no fireproof safe, and with full knowledge of the system of bookkeeping used by the insured. The agent knew that the inventories and books would be kept in this store building and not carried to some other place of safety. In this case the knowledge of Dezonia was the knowledge of the company; and a policy delivered with full knowledge of a state of facts, which under its written stipulations, would render the insurance void should be binding upon the company. This is not a case where a solicitor or local agent undertakes to waive a condition of the policy after the contract is executed. If the company is here permitted successfully to plead a forfeiture, then the policy was void *ab initio;* appellants, in fact, never had any insurance. To permit this would allow the insurance company to assume inconsistent positions to the injury of the insured. If the facts do not show a waiver, certainly they present a case of estoppel. It is said by Mr. Cooley, in his Briefs on the Law of Insurance, vol. 3, p. 2524, that:

"The general rule that the knowledge of an insurance agent is imputable to the company applies also, in most instances, to soliciting agents with reference to matters made known to him prior to the execution of the policy. The rule is, no doubt, based on the theory expressed in *West End Hotel & Land Co. v. American Fire Ins. Co.*

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(C. C.), 74 Fed. 114, that beore the execution of a policy the powers and authority of a soliciting agent are coextensive with the business intrusted to his care, so that his positive knowledge of material facts is chargeable to his principal" (citing many authorities in support of the text).

We believe there is a distinction between this case and that of *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431, 56 Am. Rep. 810. It is different also from the *Sorsby Case*, 60 Miss. 302. The notice to the agent in the latter case was in reference to something to be done in the future and which might never in fact be done. Certain it is that the instant case cannot be differentiated from the cases of *Mitchell v. Insurance* Co., 72 Miss. 53, 18 So. 86, 48 Am. St. Rep. 535, and *Insurance Co. v. Randle*, 81 Miss. 720, 33 So. 500. Our court has expressly held in these two cases that to permit the defense here pleaded would be to "legalize perfidy" and to permit the company "to attempt a fraud. In the *Randle Case*, JUDGE CALHOON says:

"The agent of the insurance company who solicited the risk did not rely on Mr. Randle's statement for anything. He went in person and examined the building . . . and knew that Randall kept no iron safe, and did not intend to get one until the following fall; and the company, therefore, is bound as upon both waiver and estoppel."

The policy in the *Randle Case* having been written in the state of Texas, many Texas cases are cited by Judge CALHOON to show that the decisions of the Texas supreme court and the Mississippi supreme court "are in entire harmony on the questions presented." There is no question but that Dezonia was fully authorized to inspect the risk, and he is the only agent who could have knowledge of the exact location of the premises, the amount and general appearance of the stock, and the manner in which the business was conducted. The safer and better view, then, would charge the company with notice that there was no fireproof safe, and that the insured did not expect to keep one.

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In view of what we have just said it is unnecessary to comment upon the alleged error of the trial court in refusing to permit the plaintiffs to show by other witnesses the extent of other insurance business written by Mr. Dezonia in the village of Big Creek, and to deduce therefrom the general course of dealing between him and his principal.

Our conclusions are in entire accord with and find support in *Rivara v. Insurance Co.*, 62 Miss. 720; *Insurance Co. v. Gibson*, 72 Miss. 58, 17 So. 13; *Insurance Co. v. Farnsworth*, 72 Miss. 555, 17 So. 445; *Insurance Co. v. Stevens*, 93 Miss. 439, 46 So. 245.

Reversed and remanded.

RODGERS v. LUMBER MINERAL CO.

[76 South. 145, Division A.]

LOGS AND LOGGING. *Trespass in logging. Right to damages.*

Where under a warranty deed to standing timber the only rights conveyed were those of ingress and egress to cut down and remove timber, the purchaser had no right to enter the land to box the trees for turpentine production or to set out fire thereon; but the right of the purchaser was limited to the privilege of going upon the land for the purpose only of cutting down and removing the timber thereon.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Suit by C. R. Rodgers against the Lumber Mineral Company. From the judgment rendered, both sides appeal.

The facts are fully stated in the opinion of the court.

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Mounger & Bishop and *R. H. & J. H. Thompson,* for appellant.

D. A. McIntosh and *T. J. Wills,* for appellee.

HOLDEN, J., delivered the opinion of the court.

This direct and cross appeal comes from the circuit court of Covington county, where the appellant, C. R. Rogers, sued the appellee, Lumber Mineral Company, for actual damages and the statutory penalty, under section 4988 of the Code of 1906, for going upon the land of appellant and setting out fire, burning up the leaves, grass, straw, and small trees thereon.

The appellee, Lumber Mineral Company, was engaged in the manufacture of yellow pine timber, turpentine, and rosin, etc., and had purchased the pine timber standing on the land belonging to the appellant, and proceeded to box the pine trees for turpentine purposes, and in order to do so entered upon the land and intentionally set out fire, causing the damages complained of in this suit. The appellee company purchased the standing pine timber by warranty deed. This deed also contained the following clause:

"Sec. 2. Together with the right at any and all times from the date hereof until March 16, 1924, of ingress and egress upon said land or any other land we may own, to cut down and remove said timber therefrom."

Under this deed to the timber the appellee company claimed the right to go upon the land and box the timber for turpentine purposes and to set out the fire destroying the leaves, straw, and small trees so as to protect its boxing operations. The appellant, Rogers, objected to the appellee company going upon his land for the purpose of boxing the pine trees, and notified appellee company to not set out any fire upon the land, appellant claiming that under the terms of the deed to the timber

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the appellee had no right to box the trees for turpentine purposes or to set out fire on his land, but that the only right the appellee company had was to go upon the land for the purpose of cutting down and removing the timber therefrom.

A jury being waived, the circuit judge, after hearing the testimony, gave judgment for the plaintiff, Rogers, for the sum of fifty-one dollars as actual damages, but held that the statutory penalty under section 4988 of the Code of 1906 assessing a penalty of one hundred and fifty dollars in favor of the owner of the land for setting out fire could not be recovered in this case, and from the judgment both parties appeal here.

There is really but one question in the case for us to decide, and that is whether under the terms of the warranty deed to the standing pine timber the appellee company had the right to go upon and use the appellant's land for the purpose of boxing the pine timber for turpentine and rosin.

It is contended by the appellant that the terms of the deed limit the right of the appellee company to go upon the land for the purpose only of cutting and removing the timber, and that the deed does not expressly or by implication of law embrace the right to use the land for the purpose of boxing the trees for turpentine, and that when the appellee company went upon the land and set out fire causing injury and damages, the appellee became liable for the actual damages and the statutory penalty.

The appellee company, who is also cross-appellant, contends that the appellant cannot recover in this case for either actual damages or the statutory penalty, because the deed to the timber is a warranty deed under our statute (section 2816, Code of 1906), and that it conveys the right, by statutory enlargement, to go upon the land and box the trees for turpentine purposes or do

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any other thing in connection with the ownership of the timber that the original owner could have done, that the form of deed prescribed by the statute is a warranty, and enlarges the rights of the appellee company, and that its rights are not limited by section 2 of the deed, which provides that the appellee company may go upon the lands for the purpose of cutting down and removing the timber therefrom. In other words, the appellee company claims that this form of warranty deed under our law gives the right to go upon the land and box the timber for turpentine purposes, or any other purposes, and that it embraces the right of turpentining the trees and burning the grass, as was done by the appellee company in this case.

The position taken in this case by the appellee company is unsound, and is not the law. The warranty deed to the timber is nothing more than a warranty of the complete ownership and possession of the pine timber as against all persons, but the deed does not embrace the right, claimed by the appellee company, to go upon the land for the purpose of boxing and turpentining the trees. This is a use and occupancy of the land not granted by the deed. The deed limits the right that the appellee company has in the use of the land by the express provision that the ingress and egress upon said land was granted for the purpose of allowing it to cut down and remove the timber therefrom. The right to go upon land for the purpose of cutting and removing the timber therefrom is a different and separate right from that of going upon the land for the purpose of boxing and turpentining the trees thereon; and the ownership and right of possession of the trees do not embrace the right of use and occupancy of the land for turpentine purposes. One is a different right of use from the other, and, unless the instrument expressly or impliedly gives both rights, then only such as is given by the deed

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may be exercised. *Yarbrough* v. *Stewart et al.* (Ala.), 71 So. 986; *Dixie Grain Co.* v. *Quinn*, 181 Ala. 208, 61 So. 886; *Christopher* v. *Curtis-Attalla Lumber Co.*, 175 Ala. 484, 57 So. 837; 18 Amer. & Eng. Encl. of L. 1134.

We hold, therefore, that the terms of the deed conveying the timber here granted no right to appellee company to go upon the lands of the appellant for the purpose of boxing and turpentining the trees and set out fire thereon. But the right of the appellee company was limited to the privilege of going upon the land for the purpose only of cutting down and removing the pine timber standing thereon. The terms of the deed expressly define and limit the rights of the appellee company, which must govern and settle the dispute between the parties to this controversy.

The judgment of the lower court on direct appeal is reversed and judgment entered here for the appellant for the statutory penalty of one hundred and fifty dollars, and the judgment of the lower court on the cross-appeal is affirmed.

Reversed and affirmed.

YAZOO & M. V. R. R. Co. *v.* MULLINS.

[76 South. 147, Division A.]

1. MASTER AND SERVANT. *Injuries to servant. Negligence. Evidence.* Under section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence on the part of the railroad company, where the whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars, the burden is upon the railroad to explain the injury and show how it occurred and failing to do this the court should give a peremptory instruction to find for the plaintiff.

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2. MASTER AND SERVANT. *Injuries to servant. Negligence. Evidence.* Section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence, is applicable as a rule of evidence in the courts of this state, regardless of whether the cause of action arises under the Federal Employer's Liability Act (Act April 22, 1908C 149, 35 Stat. 65 U. S. Comp. St. 1916, sections 8657-8665) or under the state law.

3. DEATH. *Excessive damages.*
Where a railroad flagman was killed, leaving his mother, sixty years of age with a life expectancy of fourteen years, to whom the flagman had contributed fifty dollars per month, a verdict for twenty thousand dollars was excessive, and should be reduced to twelve thousand, five hundred dollars where the suit for recovery of damages was under the Federal Employer's Liability Act, since under this act a recovery of damages is limited to the pecuniary loss to the mother and the damages from the pain and suffering of the deceased from the time he was injured until his death.

APPEAL from the circuit court of Adams county.
HON. R. E. JACKSON, Judge.

Suit by Mrs. Clara J. Mullins, Administratrix of James D. Mullins deceased, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells May & Sanders and Ratcliff & Kennedy, for appellant.

Reily & McCall, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a judgment for twenty thousand dollars obtained by the appellee in the circuit court of Adams county against the appellant railroad company as damages for the injury and death of James D. Mullins, a flagman in the employ of the appellant railroad.

The facts as to the injury and death, in so far as they are material to the decision of this case, are briefly these:

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Mullins was a flagman employed in the operation of one of appellant's interstate freight trains, consisting of about thirty-four cars, which had stopped at about two a. m. at Harriston, and there did some switching. When the train was ready to proceed north from Harriston at four a. m., it was signaled by Mullins and a brakeman to leave, and it left the station at a rapid rate of speed. Mullins when last seen before his injury was standing alongside of the train on the east side of the main track. Shortly after the train left Harriston Mullins was found lying immediately east of the main track with his arm on the rail, completely crushed from the shoulder to the fingers. He stated to the persons who found him that he had "missed his hold," but made no other explanation as to how the injury occurred before he died in the hospital about nine hours after the injury. No witness testified as to how the injury happened.

The suit was brought under the federal Employers' Liability Act, and was based upon the alleged negligence of the railroad in not furnishing safe ways and appliances for the use of deceased, and also that the engineers (doubleheader) were negligent in starting the train at a dangerous rate of speed from the station of Harriston, causing the deceased to fall when he attempted to get on the train. The plaintiff at the trial below proved the injury to deceased was inflicted by the running of the cars of appellant railroad, and also introduced testimony tending to prove by circumstances, physical conditions, and inferences, the allegations, of the declaration as to defective and unsafe ways and appliances and the dangerous speed of the train. When the plaintiff rested, a peremptory instruction to find for defendant was asked and refused by the court. The appellant railroad introduced its testimony showing that the train was properly and safely equipped, and that there were no defective ways or appliances, and that the train was not negligently handled; and it then again requested a peremptory instruction in its favor, which was refused, and the case

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was submitted to the jury. A verdict of twenty thousand dollars was returned in favor of the plaintiff.

The appellant assigns and urges several errors of the lower court. The main contention urged for reversal is that the peremptory instruction asked by the railroad should haved been granted because the appellee failed to show any negligence on the part of the railroad, and that at all events appellee did not prove that the negligence of appellant proximately caused the injury of the deceased. This contention may be correct and would justify a reversal of the judgment if the appellee had no other ground upon which to rest the judgment. But it is unnecessary for us to pass upon this question, as our *prima facie* statute (section 1985 of the Code of 1906) is applicable to this case and comes to the aid of appellee as "a present help." The whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars of appellant, and the burden was upon the railroad to explain the injury and show how it occurred. This was not done, and it appears that it could not be explained at the trial as no person knew how it occurred. The brief of counsel for the appellant contains this statement of fact:

"No person seemed to know just how the accident occurred. At all events no witness could be produced or was produced who saw the actual infliction of injury, but the testimony did show that the injured flagman stated that he had received his injury by reason of the fact that he had 'missed his hold.' As to when he 'missed his hold,' or as to what part of the train he was occupying at the time, or as to whether or not it was before or after he boarded the train, or as to what caused him to 'miss his hold,' and as to what he had hold of, the record is entirely silent, and no witness could be produced who could testify."

Therefore, the plaintiff having proved a case within the *prima facie* statute, and the defendant railroad having failed, to explain the injury, its negligence and liability

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conclusively appeared as a matter of law, and the circuit judge should have peremptorily instructed the jury to find for the plaintiff; and, this being true, it follows that appellant cannot complain because the question of negligence vel non was submitted to the jury. *Alabama, etc., R. Co.* v. *Thornhill,* 106 Miss. 387, 63 So. 674. The jury found for the plaintiff, thereby doing what the court should have instructed it to do. The error of the lower court in instructing the jury that our *prima facie* statute did not apply in the case did not injure the appellant, but was favorable to it in permitting the case to go to the jury with the chance of a verdict for appellant.

Counsel for appellant urges that our *prima facie* statute (section 1985, Code of 1906) is not applicable in the case before us because this suit is governed by the federal Employers' Liability Act, and that the *prima facie* statute is not a rule of evidence, but that it is a substantive law and give a substantial right in conflict with the federal act. It is argued that the *prima facie* statute is a state law which in effect creates a liability by virtue of the presumption of negligence from the infliction of injury by the running of cars, and that this statute conflicts with the federal act in matters of substance affecting liability, and is not a mere rule of evidence. The recent case of *Louisville, etc., R. Co.* v. *Rhoda* (Fla.), 74 So. 19, is cited as authority for the position taken by the appellant. We have reviewed this case and several others cited by counsel, and, without entering into a discussion of the holding in the Florida case, we are clearly of the opinion that our *prima facie* statute is not in conflict with the federal act, but that it is a rule of evidence, the *lex fori,* and our state courts having concurrent jurisdiction with the federal courts of causes arising under the federal act the law of the forum must govern in the trial of such cases. The authorities cited by counsel fail to convince us that our beneficent *prima facie* statute is inapplicable to cases

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under the federal act. We therefore announce here again that the statue (section 1985, Code of 1906) is applicable as a rule of evidence in the courts of our state, regardless of whether the cause of action arises under the federal act or the state law.

But the appellant contends here that, if the *prima facie* statute can be successfully invoked in this case, then the lower court erred in trying the case upon a different theory; that is, that the lower court tried the case and submitted it to a jury upon the theory that the plaintiff in the lower court had shown negligence on the part of the defendant as the proximate cause of the injury, and that she did not rely for recovery upon the *prima facie* statute. This position is untenable, for the reason that the plaintiff below did not cause the error made by the lower court in excluding the *prima facie* statute from consideration in the case, but the instruction telling the jury that the *prima facie* statute did not apply was granted at the instance of the defendant railroad company. Furthermore, the plaintiff below asked and obtained instructions not based upon any particular statement of facts in the case, but the court simply announced by instructions the proposition that, if the jury believed that the defendant was guilty of negligence which caused the injury, they should find for the plaintiff. This theory proceeded upon by the plaintiff did not preclude her from receiving the benefit of our *prima* facie statute. However, as we have said before, the appellant cannot complain because the case was submitted to the jury on the question of negligence *vel non*, as the court should have peremptorily instructed the jury, under all the testimony, to find for the plaintiff; and the only question that should have been left to their determination was the amount of the recovery. Therefore, as the jury did that which the court should have instructed it to do, and as there could have been but one

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vedict as to liability, the submission of the case to the jury and the instructions complained of by the appellant could not affect the finding of liability in the case. Therefore there is no error in the finding of liability against the appellant.

This suit being under the federal act, the recovery of damages in the case is limited to the pecuniary loss to the mother and the damages for the pain and suffering of the deceased from the time he was injured until his death. It will be observed that the mother was sixty years of age, with a life expectancy of about fourteen years, and it appears from the testimony that the deceased, Mullins, her son, was contributing about fifty dollars per month to her support. This contribution to her support and the damages suffered by the deceased on account of the pain and suffering experienced by him is the measure of her recovery in the case. The deceased lived about nine hours after he was injured, and suffered more or less during that time. The jury returned a verdict of twenty thousand dollars, and it is urged by the appellant here that this amount is grossly excessive.

After a most careful consideration of this latter contention, we think it is well grounded, and that the verdict is excessive, under the law and facts in the case. It is easy for us to calculate the pecuniary loss to the mother at fifty dollars per month for fourteen years, her life expectancy, when paid in a lump sum, but it is rather difficult for us to measure with reasonable certainty the amount of recovery for the pain and suffering of the deceased between the time that he was injured and his death. But we think, taking the most favorable view of the appellee's case, from the testimony in the record, and following the cold rule of the federal law, the recovery should not be allowed to stand for more than twelve thousand five hundred dollars, the maximum

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limit. If the appellee will enter a remittitur of seven thousand five hundred dollars, reducing the judgment to twelve thousand five hundred dollars, the judgment will be affirmed; otherwise it will be reversed, and remanded for a new trial on the question of the amount of damages only.

Affirmed conditionally.

NEW YORK LIFE INS. CO. *v.* MONTGOMERY.

[76 South. 257.]

INSURANCE. *Fraud. Question for jury.*

In a suit upon a life insurance policy, the question of fraud by the insured in making his application for insurance, was properly submitted to the jury, where there was a conflict in the testimony as to whether or not deceased knew of his malady at the time he applied for the insurance.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Suit by Mrs. Lucy L. Montgomery against the New York Life Insurance company. From a judgment for plaintiff, defendant appeals.

Appellee brought an action in *assumpsit* against the appellant, based upon two policies of insurance upon the life of her deceased husband, David Montgomery. The policies, which were identical and each for the sum of one thousand dollars, were applied for August 11, 1915, and delivered September 9, 1915, and on October 24th following the delivery of the policies the insured died of *angima pectoris,* a form of heart disease, and it is in evidence that he had been treated by a physician for this malady April 7, 1915. A short while after the death of the deceased, the company notified his widow that it had

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canceled the contracts of insurance upon the ground that the deceased had procured the same by fraud, inasmuch as he withheld this information from the company when applying for insurance, in response to questions in the application touching his physical condition. The insured was examined by the company's physician who pronounced him a good risk; the only defect discovered being partial deafness. The appellant tendered to the widow the premium paid, which was declined, and suit brought for the face of the policies and interest. There was a dispute in the evidence as to whether the deceased knew of his malady at the time he applied for insurance. He went about his work, and there was evidence tending to show he had never been advised by the physician as to the nature of his ailment at the time he was treated in April, or at any time prior to the delivery of the policies. There was sharp conflict on this point, and the case went to the jury under instructions of the court, and a verdict was returned in favor of the appellee for the amount sued for.

Under the plea of the general issue, the defendant filed the following notice:

"You will take notice that on the trial of the above-styled case the defendant will offer evidence to prove that, although the insured in both of the policies of insurance sued upon made in his application for each of the said policies the statement that he had never suffered from any ailment or disease of the heart, yet in truth and in fact the said insured was at the time of his executing and signing the application to the defendant for the said policies, and each of them, suffering from and under treatment for a certain serious form of heart disease, being the same disease of which the insured afterwards died, all of which the said insured at said time well knew and fraudulently concealed from this defendant.

"The plaintiff in the above-styled cause will take notice that on the trial thereof the defendant will introduce

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evidence tending to prove, and proving, that at the time the said David Montgomery applied to the defendant for the policies of insurance upon which suit is brought herein, the said David Montgomery did then and there in his medical examination by Dr. H. H. Haralson, the defendant's medical examiner, knowingly, intentionally, falsely, and fraudulently represent and warrant to the said defendant that he had never theretofore suffered from any ailment or disease of the heart; that whereas in truth and in fact the said Montgomery, well knew at the time of making of said application, and applications, for said policies he was suffering with a certain dangerous disease and ailment of the heart, to wit, *angina pectoris,* of which said disease and ailment the said Montgomery soon thereafter died; that the said defendant in acting upon the said written applications for insurance, believed the said representations of the said David Montgomery therein made that he had never suffered from any disease or ailment of the heart, and, believing that such representations were full, complete, and true, was then induced to issue and deliver the said policy contracts, and that, within a reasonable time after it discovered the said false and fraudulent concealments and misrepresentations, it elected to rescind the said policies, notified the plaintiff thereof, and made a tender before the filing of this suit to the plaintiff of the amount of all premiums paid on said policies and interest which the plaintiff declined to accept."

At the request of the plaintiff below the court gave the jury the following instructions:

"(1) The court instructs the jury that, unless the jury should believe by a preponderance of all the evidence in the case that David Montgomery, the deceased, sought to practice a fraud upon the defendant in obtaining the policy sued on by fraudulently concealing his ill health from heart disease, if any, when he made application for the policies sued on, or when he received the policy, it is the sworn duty of the jury to find a verdict for the

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plaintiff for the amount sued for with six per cent. interest from a reasonable time after November 5, 1915, for the defendant company to receive the proofs of death."

"(2) The court instructs the jury that the burden of proof in this case is upon the defendant insurance company to prove by a preponderance of the evidence that David Montgomery, the deceased, practiced a fraud upon the defendant insurance company in obtaining the policy sued on by fraudulently concealing his ill health from heart disease, if any, when he received the policy, and if their minds are equally balanced from all the evidence in the case on this issue it is the sworn duty of the jury to find a verdict for the plaintiff."

The court gave the following instructions for the defendant:

"(1) The court instructs the jury for the defendant that if they believe from the evidence that the insured, David Montgomery, knew that he had heart disease, or that he was advised by the witness Eustis that he was so afflicted, and that he failed to disclose the fact in his application for insurance to the medical examiner, they will find for the defendant."

The court refused instruction No. 4 requested by defendant which is as follows:

"(4) The court instructs the jury for defendant that the burden of proof is on the plaintiff, and that she must establish her right to recover the amount sued for in this cause by a preponderance of all the evidence given in charge to the jury, and if the plaintiff has failed to show her right to recovery by clear preponderance of all the testimony, they will find for the defendant."

A. H. Longino, for appellant.

McLaurin & Arminstead, for appellee.

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HOLDEN, J. delivered the opinion of the court.

This case comes within the rules of law announced in *Fidelity Mutual Life Insurance Co.* v. *Elmore,* 111 Miss. 137, 71 So. 305; *Yazoo, etc., R. Co.* v. *Grant,* 86 Miss. 565, 38 So. 502, 109 Am. St. Rep. 723, 4 Ann. Cas. 556; *Liverpool, etc., Ins. Co.* v. *Farnsworth Lumber Co.,* 72 Miss. 555, 17 So. 445; *Massachusetts Mut. Life Ins. Co.* v. *Crenshaw,* 186 Ala. 460, 65 So. 65; *Mitchell* v. *Ætna Insurance Co.,* 111 Miss. 253, 71 So. 382.

The question of fraud on the part of the insured was properly submitted to the jury under the conflicting evidence, and we find no reversible error in the record.

Affirmed.

MORGAN ET AL. v. HAYWARD.

[76 South. 262, Division B.]

1. WILLS. *Construction. Distinguished from trust.*

A letter stating that the writer was holding property to protect the interest of the addressee and that he would later give her a deed to it and declaring that the land was for the addressee at the writer's death, is not a will but a declaration of trust.

2. SAME.

In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance but the time at which by the terms of the instrument a property right under the instrument attaches. If by the terms of the instrument no property right is to attach under it until testator's death, the instrument is a will; but if a property right attaches during testator's lifetime, the instrument is a contract, even though the time of performance may be postponed till the death of the testator.

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APPEAL from the chancery court of Leflore county.

HON. JOE MAY, Chancellor.

Petition by Mrs. M. B. Hayward against H. C. Morgan and others. From an order overruling a demurrer to the petition, defendants appeal.

The facts are fully stated in the opinion of the court.

Pollard & Hammer, for appellants.

Yerger & Hughston, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellee, Mrs. Hayward, presented her petition to the chancery court of Leflore county, praying that a certain letter exhibited with the petition be admitted to probate as the last will and testament of her father, W. H. Morgan, deceased. Appellee is one of the heirs of W. H. Morgan, deceased, while the appellants are the other heirs at law. The letter charged to be a will reads as follows:

"Greenwood, Miss., Feb. 20th 1900.

Dear Belle. Don't be uneasy about your interest—I am as anxious as it is possible to take care of it for you, I don't want to do anything that would not be protection to you—a mortgage by you would not protect you—as the land could be sold subject to the mortgage—and I assure you that I will return you a good title to the land—which you have not now—when I get it in a shape that it cannot be taken from you—I am carrying a life policy in your favor—If I did not desire to protect you—would I do this. You must recognize the fact that I am the best friend you have—You are now depending on me for everything—and I am doing my best to protect you—Louis has some of the claims against you—and this will enable me to take them up—

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and fix matters before the others are pushed—of course I can hold the land here, as you hold it, in trust as it stands now but I don't want any lawsuits about it. These are expensive. I can get the money here on good time and terms—so as to be easy on me and easy on you —You can draw it here as you need it—I will give you a deed to it so that under all circumstances you will hold it.

"You can keep this letter and if any thing happens to me before I can complete it I here declaim that this land is for you at my death.

"Your loving father, W. H. MORGAN.

The petition recites that W. H. Morgan died September 27, 1905, more than ten years prior to the date of filing the petition, and that his estate had been fully administered under the decrees and orders of the chancery court, under the assumption that the deceased died intestate, and the administrator had long since been discharged. There was a demurrer to the petition, the demurrer was overruled, and an appeal granted to settle the principles of the case. One of the grounds of demurrer is directed to the character of the instrument itself. The contention is that the document is not a will, but a contract. For the purposes of this opinion it is unnecessary to set out fully all the grounds of the demurrer.

Our conclusion is that the instrument is not a will, but a declaration of a trust. The instrument possesses more of the characteristics of a contract than of a will. The distinction to be drawn here is stated by Mr. Page, as follows:

"In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance, but the time at which by the terms of the instrument a property right under the in-

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strument attaches. If by the terms of the instrument no property right is to attach under it until testator's death, the instrument is a will; but if a property right attaches during testator's lifetime the instrument is a contract, even though the time of performanc may be postponded till the death of testator." Page on Wills par. 54.

Measured by this requirement, the letter here offered was delivered and took effect during Mr. Morgan's lifetime. The effort of appellee to disregard all of the letter except the last clause cannot avail. It is perfectly manifest from the document itself that Mr. Morgan is talking about property in which his daughter already has an equity. He speaks of "your interest." The letter was never intended as a disposition of Mr. Morgan's property after his death. There is here no intention to execute a deed of gift or confer a bounty. It is to be inferred that Mr. Morgan was holding title of certain lands in trust for the use and benefit of his daughter, and the letter was intended as a declaration of this trust—declaration, against interest. On the faith of this letter, appellee might have claimed the beneficial interest in the lands during Mr. Morgan's lifetime; and it may be conceded to be the intention of the writer of this letter to repudiate any ownership, either before or after his death, subject only to legitimate claims paid for his daughter or advances made upon the lands as security. This being our interpretation of the letter itself, we think the demurrer should have been sustained.

The decree of the learned chancellor will be reversed, and decree entered here sustaining the demurrer and dismissing the petition.

Reversed.

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BREWER ET AL. v. BROWNING ET AL.

[76 South. 267, In Banc.]

1. APPEAL AND ERROR. *Law of the case.*
The well recognized rule that the court ordinarily after having laid down principles governing a case on one appeal will not review its holdings on a subsequent appeal but will ordinarily adhere to its former decision and not inquire into its correctness, is not so fixed and binding upon the court, that it may not depart from its former decision in a subsequent appeal, if the former decision in its judgment is clearly erroneous and would lead to unjust results and especially where no rights have accrued in reliance upon its former decision.

2. ADOPTION. *What law governs. Inheritance.*
Where a child was adopted in the state of Kentucky, under whose laws it inherits land from its adoptive parent, and upon its decease in infancy without issue the land so inherited reverts to the next of kin of such adoptive parent, such inheritance rules do not violate the Constitution or public policy of Mississippi, and will be applied to lands situated in this state.

ON SUGGESTION OF ERROR.

3. COURTS. *Previous decisions as precedents. Power to overrule.*
Under Constitution 1890, section 144, vesting the judicial power of the state in the supreme court and such other courts as are provided for in the Constitution, and under section 146, providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals there is no limit of the appellate jurisdiction that may be conferred upon the supreme court, and such court has the power to overrule or change its decision whenever they are in its opinion erroneous or wrongful; and such change of decision would not violate the rule of *res adjudicata.*

4. COURTS. *Erroneous decisions. Litigants.*
A litigant has no vested interest in a court's mistake where the mistake is discovered before the final ending of the litigation.

ON SUGGESTION OF ERROR.

APPEAL from the chancery court of Sunflower county. Hon. JOE MAY, Judge.

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Flowers, Brown, Chambers & Cooper, for appellants.

D. M. Quinn, S. F. Davis and *J. Holmes Baker,* for appellees.

ETHRIDGE, J., delivered the opinion of the court.

On the 15th day of July, 1901, Church W. Rule and his wife, Lula A. Rule, who were then living and having their domicile in Sunflower county, Miss., and then being without children, and being in the state of Kentucky, presumably on a visit there, on said date signed what is called in the record "articles of adoption." This adoption was signed jointly by Church W. Rule and his wife on the one part and the Louisville Baptist Orphans' Home, by its president, on the other part, by which Church W. Rule and his wife, Lula A. Rule, are said to have adopted a child, then about three years of age, and an inmate of said institution, named Lula May Browning. By said adoption the said Rule and wife obligated themselves to adopt the said infant, Lula May Browning, "and do hereby adopt said Lula May Browning, and covenant with said Louisville Baptist Orphans' Home that said Lula May Browning shall bear from this time forward the same legal relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child."/ After signing said articles of adoption, Church W. Rule and his wife took the said infant to their home in Sunflower county, Miss., and there it occupied the relation of child to them, and was treated by them as their child, up to the time of their deaths, respectively.

It appears that the Louisville Baptist Orphans' Home was chartered and incorporated by an act of the General Assembly of Kentucky, approved January 28, 1870

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(Laws 1869-70, chapter 197), and amended by an act approved January 31, 1880 (Laws 1879-80, chapter 108), and that by virtue of its charter it was invested with all the rights of parents and natural guardians of any child committed to its care, and that it was also empowered to permit any suitable person to adopt any child in its custody and control as their own child upon proper covenants in writing being executed by such persons and its president, and acknowledged by such persons and its president, and acknowledged or proven in the clerk's office of Jefferson county, Ky., as deeds may be, and by the amendment of 1880 to this charter it was provided that by the articles of adoption, when executed and recorded, "such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," etc. It appears also that the supreme court of Kentucky has held this act of incorporation constitutional, and that when this contract was executed it amounted there to a complete adoption, and authorized the child adopted to inherit as if it were the natural child of its parents.

On August 9, 1898, Mrs. M. J. Rule, the mother of Church W. Rule, died in Sunflower county, Miss., leaving a considerable body of land which descended upon her death to her children, one of whom was Church W. Rule. Church W. Rule died February 7, 1903, leaving his wife and the adopted child, Lula May Browning, but no children born to himself and wife. In 1903 there was a suit filed in the chancery court of Sunflower county for a partition of the lands left by Mrs. Mary J. Rule, mother of Church W. Rule, among the heirs then surviving, and the widow of Church W. Rule and Lula May Browning Rule were made parties. In this suit in the chancery court the bill of complaint filed contained the

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following provision with reference to the position or *status* of Lula May Browning Rule, to wit:

"The said minor, Lula May Browning Rule, was never adopted by any proceedings in court according to the laws of the state of Mississippi, but said Church W. Rule and his wife, Lula A. Rule, made their certain contract in writing with Louisville Baptist Orphans' Home bearing date of 15th of July, 1901, executed in triplicate and signed by the said Church W. Rule and Lula A. Rule and the said Louisville Baptist Orphans' Home. By said contract it was agreed that the said Church W. Rule and his wife, Lula A. Rule, should adopt, and they did thereby adopt, said minor, whose name at that time was Lula May Browning, and that the said Lula May Browning should, from that time forth, bear the same relation to the said Church W. Rule and his wife, Lula A. Rule, as if she had been born unto them and were their child, especially as to such property as would descend to her if she were their child. Complainants file herewith a copy of this contract as a part of this bill, and mark the same 'Exhibit A.' Complainants allege that from that time up to the time of the death of the said Church W. Rule the said Church W. Rule and his said wife have had the care, custody, and control of the said minor, and the said child is now in the care and custody of said Lula A. Rule. Your complainants advise that by said articles of adoption, although there have been no proceedings in the court, the said child is entitled to have a child's part in the said estate of Church W. Rule, but complainant, Lula A. Rule, submits this question for decision of this court: "The said Lula A. Rule is now the legally appointed guardian of the said Lula May Browning Rule. . . . It is asked that your honor may adjudicate whether the minor, Lula May Browning, has an interest in the said estate.' This bill of complaint being filed by Lula A.

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Rule and others in cause No. 1100 of the chancery court docket of Sunflower county, Miss."

The prayer of the bill, among other things, asks that "your honor may adjudicate whether the said Lula May Browning Rule has an interest in the said estate." A guardian *ad litem* was appointed for the minors in the suit, including Lula May Browning Rule, and the answers of the guardian *ad litem* submitting the interests of the minors to the protection of the court and praying that the allegations of the bill be required to be substantiated by strictly legal proof. The Chancellor rendered a written opinion in which he held that Lula May Rule was in fact adopted by Church W. Rule and his wife, and as such adopted child inherited one-half of the estate and lands in Mississippi of Church W. Rule, and in the decree of partition set apart one of the four shares to Lula A. Rule and her adopted child, Lula May Rule, and from this decree there was no appeal prosecuted, and the right to an appeal has long since been barred by the statute of limitations. After this decree, and on the 29th day of November, 1905, the infant, Lula May Browning Rule, died. Mrs. Lula A. Rule, after the death of Church W. Rule, married one J. B. Fisher, and after such marriage Lula A. Rule Fisher, formerly the wife of Church W. Rule, died, leaving her husband, J. B. Fisher, who was one of the parties to the former appeal in this cause, but who since said appeal has disposed of his interest and claims to other appellants in this case. Subsequent to the death of Lula A. Rule Fisher, the brothers and sisters by natural blood of Lula May Browning Rule filed their bill in the chancery court, praying for a partition of the lands set apart to Lula A. Rule and Lula May Browning Rule by the cause No. 1100 jointly to be divided between the brothers and sisters of Lula May Browning Rule by the blood, and the appellants are original defendants in said suit. This bill for a partition

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came on for hearing in the chancery court of Sunflower county, Miss., and the chancellor adjudged that the brothers and sisters of the blood of Lula May Browning Rule would inherit her interest in the said lands to the exclusion of Lula A. Rule Fisher and her heirs, and ordered a partition of the said property in accordance with the prayer of the bill, from which order an interlocutory appeal was allowed to this court, and was decided by this court in the case of *Fisher* v. *Browning et al.*, 107 Miss. 729, 66 So. 132, in which opinion this court, as then constituted, adjudged that the decree of the chancellor in cause No. 1100 in Sunflower county adjudicated that Lula May Browning Rule inherited one-half of the estate of Church W. Rule, and that said judgment constituted *res adjudicata*, but decided that the chancellor was wrong in holding in that cause that Lula May Browning Rule was entitled to inherit from Church W. Rule as to lands under the laws of the state of Mississippi, and that the public policy of Mississippi with reference to inheritance of lands would be violated by adoption of a rule of comity as applied to adopted children in Kentucky, permitting them to inherit as heirs under the laws of this state. They also held that the property allotted to the said Lula May Browning Rule should go to the sisters and brothers of the blood to the exclusion of the adopting parent, Mrs. Lula A. Rule Fisher, and her heirs. The cause was remanded for further proceedings, and partition was made in accordance with the former decree reported to the court and confirmed, and final appeal is prosecuted here from that decree.

Several questions are presented now for consideration, among which the following may be stated: Is the opinion of this court on the former appeal conclusive on the court now under the doctrine of the law of the case? Second. If not, was Lula May Browning entitled to inherit from the adopted parents, Church W. Rule and

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Lula A. Rule? Third. If she was, would the property inherited at the time of her death go to the brothers and sisters of the blood, or would it go to the adopted mother and her heirs to the exclusion of the sisters and brothers of the blood?

As to the first ground, whether or not the former decision of this court constitutes the law of the case in such sense as this court on this appeal is bound to follow it is not free from difficulty because of the well-recognized rule that the court, ordinarily, after having laid down principles governing a case on one appeal, will not review its holdings on a subsequent appeal, but will ordinarily adhere to its former decision and not inquire into its correctness. We do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on a subsequent appeal if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results. Where the facts are the same, and where there has been no change of conditions or situations as that a change of decision would work wrong and injustice, the court may, on the subsequent appeal, correct its former decision where it is manifestly wrong. In the present case there is no such change of condition as would inflict any hardship upon any party or person, and we are satisfied that the court reached the wrong conclusion in its former opinion. This court has, on more than one occasion, departed from its first announcement on subsequent appeal of the same case where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision. In *Maxwell* v. *Harkleroad,* 77 Miss. 456, 27 So. 990, this court said:

"It is further, in justice to the learned chancellor below, to be said that the decree rendered by him was induced by the opinion (formerly delivered by the writer

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hereof) of this court. It is not a duty merely, but a pleasure, to correct error at the earliest possible moment, and we are glad of the opportunity to do this in this case, while it is still pending undetermined."

See, also 2 R. C. L. p. 226, section 188, where it is said: "The better rule, and that more in accord with justice, is that, though ordinarily a question considered and determined in the appeal is deemed to be settled and not open to re-examination, on a second appeal it is not an inflexible rule, and if the prior decision is palpably erroneous, it is competent for the court to correct it on the second appeal."

See, also, *Missouri, K. & T. R. Co.* v. *Merrill,* 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287, where Justice SMITH, speaking for the court, says: "Counsel for defendant in error . . . insists that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally."

See, also, *Ellison* v. *Georgia Elec. Co.,* 87 Ga. 691, 13 S. E. 809 (where BLECKLEY, C. J., says: "The only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not '*Stare decisis,*' but '*Fiat justitia ruat coelum*' [Let right be done, though the heavens should fall]"); *Messinger* v. *Anderson,* 225 U. S. 436, 32 Sup. Ct. 740, 56 L. Ed. 1152 (where the supreme court of the United States said: "In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering

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them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided—not a limit to their power"); *King* v. *West Virginia,* 216 U. S. 101, 30 Sup. Ct. 225, 54 L. Ed. 401; *Remington* v. *Central Pacific R. Co.,* 198 U. S. 100, 25 Sup. Ct. 577, 49 L. Ed. 963.

The opinion of COOK, J., in *Johnson* v. *Machinery Co.,* 104 Miss. 217, 61 So. 178, 62 So. 4, is pressed on us as being conclusive on us on the law of the case as applied to this appeal. We think the language used in that opinion as to the binding effect of a decision on first appeal is too broad. We do not approve of that portion of the opinion which states:

"If the decision of the court upon the original appeal was made upon a record which, in all substantial particulars, was the same as now before us, we must decide now as we decided then, however wrong we may believe the court was in the first instance. This is the law, and we do not question its wisdom; nor do we wish to evade rules in order to right a real or imaginary wrong."

We think courts are created and maintained and sworn to administer justice, and not to adhere strictly to arbitrary rules. When a rule of decision defeats justice or seriously impairs it, it should be departed from rather than followed. Rules are made to secure justice, not defeat it. We think the rule of "the law of the case' is a good rule of practice, and should be followed, except in rare cases where the decision is manifestly and palpably erroneous and to follow it would result in grave injustice being done.

The decree of the chancellor in cause 1100, being *res adjudicata,* established the *status* of adoption between parent and child under the laws of Kentucky, and it was by virtue of this status so established by our state court that the child took the one-half interest in the property of the deceased adoptive father; and by virtue of the same *status* the adoptive mother took the child's interest in the property at its death. If the adjudication

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of the *status* by the chancellor in cause 1100 is *res adjudicata,* as held by Justice OWENS in the former decision of this court, then such *status* should not be followed in part and ignored in part. The relation and status established should be observed throughout with reference to the descent of the property involved.

As to the second proposition as to whether or not Lulu May Browning Rule, the adopted child, was entitled under the facts stated to inherit from the adoptive parent Church W. Rule, the former opinion held that to permit such inheritance would violate the public policy of this state, and while, under the law of Kentucky the adoption had the effect of conferring upon the adopted child full capacity to inherit lands or personal property in Kentucky as a natural child, still it was contrary to the public policy of Mississippi for such child to inherit lands in Mississippi, and that the rule of comity would not require the state to adopt the Kentucky law upon that subject, or recognize the *status* of parent and child created under the laws of Kentucky by reason of the adoption. The court on this subject says:

"We recognize that the weight of authority and trend of modern decisions is to the effect that every other state will recognize the *status* of the state creating it, and will give effect to it just as if that *status* were created under the law of the state where it is invoked, but provided always that the *status* and the rights flowing from it are by laws of the state which are in harmony and consistent with the laws and public policy of the state where it is invoked, and that therefore Mississippi will recognize the *status* of the child, created in Kentucky, as the adopted child of Church W. Rule, and will enforce all the rights of the child in that situation here, provided the rights flowing from that adoption in Kentucky and the laws of that state on the same subject are not inconsistent with or opposed to the laws or public policy of this state on the same subject. . . . We do not believe, however, that this child was capacitated by the adoption in Kentucky

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to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi."

If we understand the opinion in the former case, it holds that it would be inconsistent with the laws and Constitution of Mississippi for an adopted child to inherit lands under the statutes of Mississippi. The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion, in view of the previous decision of *W. T. Adams* v. *America Adams et al.*, reported in 102 Miss. 259, 59 So. 84 Ann. Cas. 1914D, 235, where this court held that, where a petition was filed under the Code pertaining to the adoption of children, seeking the adoption of a minor, and a decree was entered providing that the custody of the minor be awarded to the adopting father, and that he be clothed with all the rights and bound by all the obligations with reference to said child as that of a parent, and that said child be clothed with all the rights and bound by all the obligations with reference to the adopting father and his estate, real and personal, at his death, as that of a daughter, and that the name of the child be changed to that of the adopting father, holding that such a decree under our laws creates a relationship of heir on the part of the adopted daughter. It is therefore not contrary to the Constitution, laws, and public policy of Mississippi for a person to adopt a child so as to make it an heir and capable of inheriting both real and personal property.

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In the case of *Finley* v. *Brown*, 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N. S.) 1285, the Tennessee court in an able opinion holds that a child adopted in one state under the law of comity has a right to inherit real estate situated in another state even as to lands. In the report of the L. R. A. there is a case note in which the learned editor of this series says:

"As indicated in those notes, the decision of the . . . court in Finley v. Brown, giving effect to the foreign adoption for the purposes of inheriting real estate in Tennessee, is sustained by the weight of authority in this country."

See, also, as supporting this doctrine, 17 L. R. A. 435; 65 L. R. A. 186; 8 L. R. A. 747; 8 L. R. A. (N. S.) 117; 19 L. R. A. 201; 20 L. R. A. 199; 21 L. R. A. 380, 483; 23 L. R. A 196, 665; 27 L. R. A. 791; 30 L., R. A. 263; 33 L. R. A. 207, 34 L. R. A. 500; *Humphreys* v. *Davis*, 100 Ind. 369, 50 Am. Rep. 788.

In our view it would be unjust to both parent and child under the adoption made such by the law of one state in which they are given full right of parent and child to hold that the mere fact of moving to another state would unset and unsettle this relationship. It is of the utmost importance that the status of this character should be maintained so far as it is possible to do it without doing violence to the laws and institutions of the state wherein the parties have moved. It was undoubtedly the intention of Church W. Rule and his wife in adopting this child to give the child all the rights of a natural child and this intention should be carried out to the fullest extent permitted by the laws of this state. Under the Kentucky law the adopted child (adopted in the manner this one was), inherits from the adopting parent as a natural child and is for all legal intents and purposes the real child of the adopting parent, and under the laws of that state the adopting parents are the heirs of the adopted child in the case of the death of the child without issue and inherit from the child all property which it had derived from the

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adopting parents or either of them. According to the construction of courts of Kentucky the identical contract here involved created the legal *status* of parent and child between Mr. and Mrs. Rule on the one part and Mary Browning on the other. If this is true in Kentucky, why is it not true also in Mississippi? We are unable to appreciate the idea that this state will not fully and completely recognize and enforce a *status* thus created in Kentucky. When we apply our laws to the Kentucky *status* we find no difficulty in defining the reciprocal rights of the parties to the articles of adoption. Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule in legal contemplation is the mother of the deceased child. There is no possible way in which Lula May Browning could have inherited the property in controversy except by reason of her legal status of daughter to her deceased father, Church W. Rule. The law of Kentucky has defined the *status* in a similar case as follows: By the event of adoption the adopted child becomes the lawful child of the adopting parent in the same light as a child born in lawful wedlock. The estate of a natural child which he inherits from his parent is defeated by his death in infancy without issue, and the property then goes back to the kindred of that adopting parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and if he dies in infancy and without issue the property under the *status* descends to the kindred of that parent from whom he receives it. *Lanferman* v. *Vanzile,* 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563. See, also, *Re Jobson,* 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062. So, we see that Lula May Browning by the event of adoption becomes the legal child of Church W. Rule and wife, the adopting parents, in the same light as a child born in lawful wedlock; and when she dies in infancy without issue, under the inheritance

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laws of this state the property descends to her foster mother who survives her. We see no conflict, real or imaginary, between our laws and the laws of Kentucky on this subject. Under our law the adopting parent may adopt the child fully and completely, or it may adopt it and limit its rights by a decree of court. In other words, under our statutes the parent can either adopt partially or totally, conferring or withholding benefits at his option but if he confers upon the child full benefits as though it were a natural child, there is nothing to prevent his so doing, and there can be no inconsistency between our law and the law of Kentucky as applied to the present adoption. If we treat the adoption in Kentucky as if it had been done in the chancery court of Mississippi, we find there is no greater right conferred there than may be conferred here. This construction appeals to us as natural justice entirely consistent with sound judicial construction. In fact when judicial construction is out of harmony with natural justice, the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail. The principal of reciprocal relations between parent and child is recognized and enforced by the Kentucky law. A foster child inherits from the foster parent, and when the foster child, inheriting from one of the foster parents, dies without issue, the surviving foster parent takes the property which the foster child received from the intestate foster parent because the surviving foster parent is in law the mother of the deceased.

In *Wagner* v. *Varner,* 50 Iowa, 532, the court said that, upon the death of an adopted child intestate and without wife or descendant, may its heirs at law be sought in the family under which it was born or in the family of which it became a part by adoption? Has its relationship with its natural parents been disturbed by the act of adoption by which they relinquish all control over it and consent that it should become in law the child of others? So far as its rights of inheritance are concerned they probally extend to both families to the extent of entitling it to inherit

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from both the adopting and natural parents. If the adopted child inherits property from the person on the theory that it is the legal child of such person, we are unable to see any reason why upon its death such property should not descend to the relationship of the child created by the adoption. It is more consistent with justice to hold that the property inherited by Lula May Browning Rule from Church W. Rule should go to that line of legal heirs through which it was derived. It seems to us that it best harmonizes with the public policy of the state to recognize to the full extent the rights conferred by adoption. Those who have no natural children should be encouraged to adopt some child who has no parents to take care of it and educate it, and as far as possible to make such adopted child the real child of the adopting parents. If the rule should be adopted in this state and adhered to that the property coming to the adopted child from the adopting parents should, on the death of the child, descend to strangers of the blood of the adopting parent, it would have a strong tendency to discourage the good work of the adopting parents in taking some, perhaps unfortunate, child and make it their very own, conferring upon it all the rights and privileges that could be conferred upon a child, and at the same time should the child unfortunately die, not to permit them to reinherit from the child that which they had, through motives of kindness and generosity, bestowed upon it.

Judge FREEMAN, the able annotator of the American State Reports, in a note to *Van Matre* v. *Sankey*, 39 Am. St. Rep. 228, 229, in commenting upon decisions holding that the adopting parents could not inherit from the adopting child said:

"The vice of these decisions, in our judgment, lies in the fact that the courts making them gave too strict a construction to statues of adoption, and were unwilling to concede that such statutes had any other object than to confer the benefit of heirship to the adopting parent upon the child adopted. The purpose of these statutes we

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conceive to extend further than this, and, in effect, to take the child from its parents by birth, and to give it to the parents by adoption, and to create, as between it and such parents, the reciprocal rights and relations of parent and child, and to give to the former both the incidental and the direct advantages of parentage; and we therefore think that, upon the death of such child intestate and leaving estate which, by statute, vests in its parnts, that the word 'parents,' as thus used, should be deemed to designate the adopting parents,rather than the parents by birth; for, under the law, it is the former, rather than the latter, who occupy the relation of parent to the child at the time of its death."

Judge ELLIOTT, speaking for the supreme court of Indiana, in *Humphries* v. *Davis*, 100 Ind. 274, 50 Am. Rep. 788, uses this language:

"It is, as we have seen, the legal *status* of the person respecting the subject that determines his legal rights. To again quote from Austin: 'The law of persons is the law of *status* or conditions. . . . The rights and duties, capacities and incapacities, which constitute a *status* or condition, are commonly considerable in number and various in kind. . . . Such are the rights and duties, capacities and incapacities, of husband and wife, parent and child, guardian and ward.' 2 Austin, Jurs. 709, 711. As the *status* of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the *statuts* of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title."

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We, therefore, reach the conclusion that if Lula May Browning Rule, having inherited the property in this suit from her adopting father, Church W. Rule, and having died without issue, the property descends to that heir of Church W. Rule, to wit, his wife, who bore the relation of adopted mother to said Lula May Browning Rule. It follows that the complainants had no legal right to the property claimed in their bill, and were without right to file the suit for partition, and the case is reversed, bill of complaint dismissed, and judgment entered here for the appellants.

Reversed, and judgment here.

COOK, J., took no part in this decision.

SMITH, C. J. (dissenting). Every question presented to us for decision by this record was expressly decided against appellants on the former appeal herein, and should not now be open to review, for it is a rule of general application, heretofore announced and acted upon over and over again by this court, that:

"The decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested."

The *res judicata* and law of the case rules are very much akin, were formulated to accomplish the same object, and are each based "upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation, '*interest reipublicæ ut sit finis litum*'; the other, the hardship on the individual that he should be vexed twice for the same cause, '*Nemo*

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debet bis vexari pro eadem causa.' " The first of these rules is followed in all jurisdictions where the common law prevails; the second is followed in the great majority of such jurisdictions, and in the language of the supreme court of the United States in *Great Western Tel. Co.* v. *Burham*, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991, is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal." One of the objects sought to be accomplished by the rule is to prevent exactly what has happened in this case, that is, the reversal of a former judgment solemnly rendered and thereafter acted upon as final solely because on the second appeal the personnel of the court has changed and the new judges differed with their predecessors as to the judgment which ought formerly to have been rendered. As was again said by the supreme court of the United States in *Roberts* v. *Cooper*, 20 How. 467, 15 L. Ed. 969:

There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

Among the many cases in which the rule has been followed by this court are: *McDonald* v. *Green*, 9 S. & M. 138; *Green* v. *McDonald*, 13 S. & M. 445; *Smith* v. *Elder*, 14 S. & M. 100; *Bridgeport et al. v. Gray*, 39 Miss. 136; *Swan* v. *Smith*, 58 Miss. 875; *Still & Still* v. *Anderson*, 63 Miss. 545; *Nutt, Adm'x*, v. *Knut*, 84 Miss. 465, 36 So. 689; *N. Y. Life Ins. Co.* v. *McIntosh*, 46 So. 401; *Johnson* v. *Success Brick & Machine Co.*, 104 Miss. 217, 61 So. 178, 62 So. 4; *Supreme Lodge, K. P., v. Hines*, 109 Miss. 500, 68 So. 485; *Cochran* v. *Latimer*, 111 Miss. 192, 71 So. 316.

In the majority opinion the existence of the rule is admitted, but it is said that:

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"We do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on subsequent appeal if the former decision in its judgment, after mature consideration, is erroneous and wrongful and would lead to unjust results."

This statement is in direct conflict with all of the former announcements of this court upon this subject, and it is founded upon a total misconception of the purpose sought to be accomplished by the rule, which is not to prevent the reversal of former judgments unless such judgments are erroneous and mischievous, but to cut off any inquiry at all into the rightfulness or wrongfulness thereof. On the second appeal in *Swan* v. *Smith,* 58 Miss. 875, the correctness of the judgment rendered on the first appeal was called in question by the appellant, and in responding thereto this court said:

"Even if our former decision on this point was wrong, it must be accepted as the law of this case."

Similar and even more emphatic language was used in *Nutt* v. *Knut,* 84 Miss. 465, 36 So. 689; *Ins. Co.* v. *McIntosh,* 46 So. 401; *Johnson* v. *Success Brick & Mch. Co.,* 104 Miss. 217, 61 So. 178.

It is said, however, in the majority opinion that:

"This court has on more than one occasion departed from its first announcement on subsequent appeal of the same case where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision."

But the only case cited in support of this statement is *Maxwell* v. *Harkleroad,* 77 Miss. 456, 27 So. 990. The law of the case rule was not involved on the second appeal in that case, and it constitutes no sort of authority for the statement that this court has heretofore departed therefrom. In that case a bill in chancery was filed by Harkleroad, as guardian, against Maxwell, a

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former chancery clerk "who had *ex officio* been the guardian of Harkleroad's estate, . . . to recover excessive commissions retained by Maxwell as compensation for his services" as such guardian. The trial court sustained a demurrer to this bill and on appeal to this court that decree was reversed, the court holding that on the allegations of the bill complainants were entitled to recover. Afterwards, when the case came on to be heard in the trial court on its merits, the real facts upon which Maxwell predicated his claim to the commissions charged by him were then for the first time brought to the court's attention, from which it appeared that he was entitled to the commissions charged. The trial court having decided otherwise, its decree was again reversed on appeal, this court in so doing, among other things, saying:

"When the case was here before it was presented on demurrer, furnishing another of many illustrations of the unsatisfactory nature of such defense, when all the facts set up by answer would make clear the right decision. This guardian is entitled, as the facts now show, to the highest praise for exceptionally faithful and skillful management of this estate."

It clearly appears, therefore, that on the second appeal the case presented by the evidence was materially different from that presented by the allegations of the bill on the first, and no court, so far as I am aware, has ever held that the law of the case rule applies to such a situation. The simple truth of the matter is that the rule does not meet with the approval of the majority of the judges of this court as now constituted, and the opinion herein rendered by that majority, while professing not to do so, in fact repudiates the rule, overrules without giving any of them, save one, "even the cold courtesy of a passing glance," the long and unbroken line of decisions of this court announcing and following it, and aligns this court with those courts which determine whether a decision

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rendered on a former appeal in the same case shall be adhered to solely by the rule of *stare decisis,* which rule "does not prevent a court from overruling a previous decision which shall appear to it to be plainly and palpably wrong, where this course can be taken without inflicting serious injury on any person, or where greater harm would result from following the erroneous decision than from reversing it." Black on Judicial Precedents, p. 199. I do not for a moment question the power of the court to overrule the cases establishing the law of the case rule, but I confidently assert that they ought not to be overruled if the principle of *stare decisis* is of any binding force, for he would be a bold man indeed who would assert that a rule is manifestly wrong which has met the approval of so many courts and is supported by so many long and unbroken lines of decisions as this rule has received and is supported, and who can say that more good will be accomplished by its rejection than by its retention.

Coming now to the former decision in this case, I shall attempt to show that, in so far as it holds that Mrs. Rule did not inherit the land here in controversy upon the death of Lula May Rule, it is not only not manifestly wrong, and, unless it is, it should not be here departed from, even under the rule announced by the majority opinion, but, on the contrary, that is is manifestly right.

In the beginning I desire to concede that our former opinion was wrong in so far as it holds that Lula May Rule did not inherit the land in controversy on the death of her adoptive father, Church W. Rule, but the ground upon which I shall base this concession is consistent with and supports my further opinion that upon the death of Lula May Rule the land was inherited from her, not by Mrs. Rule, her adoptive mother, but by her brothers and sisters. The criticism in the majority opinion upon our former decision that Lula May Rule did

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not inherit this land upon the death of Church W. Rule, her adoptive father, is based upon a total misconception of the ground upon which that decision was based. That criticism is as follows:

"The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion in view of the previous decision of *W. T. Adams* v. *America Adams et al.*, reported in 102 Miss. 259, 59 So. 84, Ann. Cas. 1914D, 235, where this court held," etc.

On the former appeal we not only did not intimate that we then entertained such an opinion, but expressly pointed out more than once that a child adopted in Mississippi can inherit property from its adoptive parents, provided the right so to do is conferred by the decree of adoption. The ground upon which we then proceeded was clearly stated in the following language:

"We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi. Its status as an adopted child of Mr. and Mrs. Rule may be recognized here without recognizing its capacity to inherit lands, which is a wholly different thing."

The opinion then proceeded to specifically point out wherein we thought that the Kentucky statute was in-

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consistent with and antagonistic to our Constitution and laws.

The right of inheritance is not a natural, but is a civil, right conferred by law, and in so far as real property is concerned it is universally held that it is determined solely by the law of the place where the property claimed to have been inherited is situated. This is but a branch of that broader universal rule that the title to real property must be determined by the *lex rei sitæ*.

The right of one person to inherit land from another depends upon the relation in which such persons stands to that other, or, in other words, upon his *status* or condition, which *status* or condition must be determined by the law of the place where it was created (*Smith* v. *Kelly*, 23 Miss. 167, 55 Am. Dec. 87); and, second, upon whether a right of inheritance is conferred upon persons having such *status* by the law of the place where the land is situated. The *status* created in one state will be recognized in all other states, provided it is not such as is inconsistent with the laws and public policy of such other states, but such right of inheritance only will attach thereto in such other states to land there situated as would attach had such *status* been created by the laws thereof. 1 C. J. 1402; 1 R. C. L. 615; *Ross* v. *Ross*, 129 Mass. 246, 37 Am. Rep. 321; *Finley* v. *Brown*, 25 L. R. A. (N. S.) 1285; *Gray* v. *Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; *Van Matre* v. *Sankey*, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; *McColpin* v. *McColpin*, 77 S. W. 238; *Shick* v. *Howe*, 137 Iowa, 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980; *Melvin* v. *Martin*, 18 R. I. 650, 30 Atl. 467; *Smith* v. *Derrs, Adm'rs*, 34 Pa. 126, 75 Am. Dec. 641; *Lingen* v. *Lingen*, 45 Ala. 410; *Calhoun* v. *Bryant*, 28 S. D. 266, 133 N. W. 266.

The *status* here claimed for Mrs. Rule and her adopted daughter, which *status* in fact unquestionably existed,

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was that created by the adoption of Lula May Browning by the Rules in the state of Kentucky. The right to adopt the child of another is, in all common-law jurisdictions, created solely by statutes, which statutes are also the measure of the rights and obligations springing from such an adoption (*Villier* v. *Watson,* 168 Ky. 637, 182 S. W. 869), and the courts, under the most elementary principles, are without rightful power to add thereto or detract therefrom.

From these elementary rules, which have heretofore been uniformly acted upon by this court in dealing with the *status* created by the marital relations, the birth of children, etc., and which are equally binding in a case wherein the *status* is that created by the adoption of a child, it necessarily follows: First, as is held by the great weight of authority, that Lula May Rule inherited the lands in controversy from her adoptive father, Church W. Rule, upon his death, provided the laws of this state permit children adopted under the laws thereof to inherit property from their adoptive parents; and, second, as is held by all of the courts that have dealt with the question, that Mrs. Rule did not inherit the land in controversy on the death of her adopted daughter, Lula May Rule, unless the laws of this state permit an adoptive parent to inherit property from an adopted child.

The statute which regulates the adoption of children in this state is section 542, Code 1906, as amended by chapter 185, Laws of 1910, and by it a child of another may be adopted by means of a proceeding in the chancery court, which, in its decree creating such an adoption, must specify the benefits which the adoptive parent proposes to confer upon the adopted child, to all of which such child shall be thereafter entitled, one of which benefits may be, as has heretofore been held by this court, the right to inherit property from the adop-

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tive parent. This statute, therefore, confers upon adopted children the right to inherit land from the adoptive parent, provided the decree of adoption so adjudges, from which it necessarily follows, under one of the rules hereinbefore set out, that a child adopted in another state in such manner as to give it there the right to inherit property from the adoptive father will be given such right here. In other words, section 542 of the Code provides for the inheriting of land by adopted children, and since Lula May Rule had that right under the laws of Kentucky by which her status as an adopted child was created, she will, under the rules hereinbefore announced, have the same right here, from which it, of course, follows that upon the death of her adoptive father she inherited a child's portion of the land of which he then died seised and possessed.

Coming now to the right of Mrs. Rule to inherit the land on the death of Lula May Rule, and, turning again to section 542 of the Code, it will be observed that no right of inheritance whatever is there conferred upon adoptive parents, the only right there conferred upon them being that they "shall have and exercise over such infant all such power and control as parents have over their own children," and, under well-settled and most elementary rules, this court has no rightful power to confer such a right upon them. In passing I will say that our statute in this respect does not stand alone among the statutes of the states, for practically all of them as originally drawn confer no such right upon adoptive parents, though some of them now by amendment or new enactment do so. Section 1649 of the Code confers no such right, for the parents and the children there dealt with are natural and not adoptive parents and children. Since no such right of inheritance is conferred by the laws of this state upon adoptive parents, it necessarily follows under the rules herein-

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before set forth that adoptive parents who become such under the laws of another state have no such right here, even if the laws of such other state give them such a right. The majority opinion cites no authority to the contrary, and none, I confidently assert, can be found.

The ground upon which the majority opinion, in this connection proceeds is: First, under the laws of Kentucky Lula May Browning, because of her adoption by the Rules in that state, became their lawful child "in the same light as a child born n lawful wedlock;" and, second, by reason thereof, when she dies [died] in infancy without issue, under the inheritance laws of this state, the property descends [descended] to her foster mother who survives [survived] her." It is said in that opinion that:

"Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule in legal contemplations is the mother of the deceased child."

No statute of this state or decision of any court is referred to in support of the second of these propositions, and it is based, in so far as I can gather from the opinion, upon the attempt by the majority to administer what they call natural justice, losing sight altogether of the universal rule that the right of inheritance is purely legal, and unless conferred by law does not exist. It may be conceded that in Kentucky the adoption of Lula May Browning created reciprocal rights of inheritance between her and her adoptive parents, but since our statutes recognize no such right in an adoptive parent such a right created under the Kentucky statutes cannot be given effect to in this state, for, as hereinbefore pointed out, no right to inherit land attaches to a *status* created in a state other than that

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in which the land is situated, unless such right would attach thereto had such *status* been created in the state wherein the land is situated.

It may be that an adoptive parent may have the right to inherit from a child adopted under a statute which provides that the reciprocal relations between the adopted child and its adoptive parents shall be, for all purposes, identical with the relations that would have existed between them had the child been born to such parents in lawful wedlock, as to which I am not here called upon to express an opinion, for our statute contains no such provision, and no such relation is created by the adoption of a child under it. The contrary view was earnestly pressed upon and rejected by this court in *Beaver* v. *Crump,* 76 Miss. 34, 23 So. 432. In that case the appellants sought in the court below to establish their claim to an estate left by Seth A. Pool as his legal heirs, and to have the claim of the appellee thereto canceled as a cloud upon their title. The appellee made her answer a cross-bill, and claimed title to the property by inheritance from Pool, because of the fact that she was his adopted daughter, and prayed that if this claim should be rejected by the court, it would then decree the specific performance of a promise, made by Pool in the petition by which he procured from the court the decree of adoption, to devise to her the land in controversy. The decree of adoption, after reciting Pool's promise to devise the land, proceeds as follows:

" 'It is therefore considered, and so ordered by the courts, that the said petition be allowed, said adoption granted, and the name of said Alice Hulsey is hereby changed to Alice Hulsey Pool, and that she be entitled to all the benefits conferred and imposed by section 1496, Code of 1880, in that behalf made and approved.' "

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In support of their contention that under our statute the mere fact of adoption brings about the relation and *status* of parent and child, the brief of counsel for the appellee, after setting forth that "the law of adoption comes to us from the civil law, and to it we must go in order to give to our statute on the subject its proper construction," and citing the case of *Humphries* v. *Davis*, so much relied on here in the majority opinion, proceeded as follows:

"By a careful examination of the authorities, fully collated in the two case above given, it will be found that to adopt a minor means something—it brings about the relation and *status* of parent and child, with all of the obligations and liabilities, as well as all of the benefits, of such a relation. There cannot be a child without the correlative of a parent; where there is one, there is the other, with all that the relation means."

Had this argument prevailed with the court, the case would necessarily have been decided in the appellee's favor, but it did not prevail, and she lost. All the authorities hold, without conflict in so far as I am aware, that the adoption of a child does not vest any of the parties to the adoption with the right to inherit property from the others, unless the statute under which the proceeding is had so provides, either expressly or by necessary implication. The assumption here by the majority of the court that the Kentucky statute, under which this child was adopted, made her for all purposes the child of the Rules to the same extent that she would have been had she been born to them in lawful wedlock, so that she on the one side, and her adoptive parents on the other, became vested with reciprocal rights of inheritance, has no foundation in fact, as the supreme court of Kentucky has more than once held. What that court in fact has decided as to the rights of inheritance growing out of the adoption of a child under the

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statutes of that state is this: That the adopted child and its issue have the same right of inheriting property from the adoptive parents as they would have had had the child adopted been born to the adoptive parents in lawful wedlock, but that the adoptive parents have no right whatever of inheriting property from the adopted child. *Power* v. *Hafley,* 85 Ky. 671, 4 S. W. 683; *Atchison* v. *Atchison,* 89 Ky. 488, 12 S. W. 942; *Merrit* v. *Morton,* 143 Ky. 133, 136, S. W. 133, 33 L. R. A. (N. S.) 139; *Lanfermann* v. *Vanzile,* 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563.

The case last cited, *Lanferman* v. *Vanzile,* is the one here relied on by the majority of the court, and its conception of what the case held is set forth in a quotation therefrom. This quotation, however, does not appear in the majority opinion in the form in which the language was used by the Kentucky court, and makes the court appear to have decided just the converse of what it in fact did. The first sentence of this quotation as it appears here in the majority opinion is only a part of a sentence quoted by the Kentucky court, and set forth in its opinion at page 752 of 150 Ky., at page 1009 of 150 S. W., Ann. Cas. 1914D, 563, in the official report, from an opinion formerly delivered by it in the case of *Power* v. *Hafley,* supra, and refers to the adoption statute. As formulated by that court the sentence reads as follows:

"That it is the event of adoption that fixes, under the law authorizing the adoption, the legal *status* of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise."

As it appears here in the majority opinion, it reads:

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"By the event of adoption [the adopted child] becomes the lawful child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock."

The next two sentences of the quotation are taken from page 751 of 150 Ky., page 1008, of 150 S. W., Ann. Cas. 1914D, 563, in the official report of the case, and were used by the court in referring, not to the adoption statute, but to a section of the Kentucky statutes of descent and distribution, which places a limitation upon the estate which an infant receives from a parent by gift, devise, or inheritance, and which I shall presently specifically set out. In that case:

"Henry Lanferman and his first wife, Anna Lanferman, by a proceeding duly had, adopted, on June 12, 1891, Albert Urlage, who was then seventeen months old. His foster parents took him to their house, and reared and educated him as if he was their natural child, he being known as Albert Lanferman. They afterwards had three children of their own. The wife died intestate, and Henry Lanferman married a second time. He then died intestate, leaving property in the city of Covington. After the death of Henry Lanferman, the adopted child, Albert Lanferman, died unmarried and without issue, in infancy. A partition suit was instituted to divide the estate of Henry Lanferman among his three children. In this proceeding Clara Vanzile, the natural mother of the adopted child, Albert Lanferman, filed her petition, claiming that he took, at the death of his foster father, an undivided one-fourth of the estate, and that this one-fourth descended, at his death, to her. The three children of Henry Lanferman demurred to this pleading. The court overruled their demurrer, and, they failing to plead further, judgment was entered in favor of Mary Vanzile for one-fourth of the property. They appeal."

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The Kentucky statute (Ky. St., section 2071) under which the child had there been adopted provides for an adoption by petition to the circuit court which court shall declare "such person [the child adopted] heir at law of such petitioner and, as such, capable of inheriting as though such person were the child of such petitioner." The statute under which Lula May Rule was adopted provides that the child adopted "shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," so that everything there said is applicable here. The points made by counsel in the argument of the case do not appear from the report thereof, but it is said in the opinion of one of the justices who dissented from the majority on another proposition, that:

"It is not argued in the case at bar anywhere or by anybody that an adopting father has, by virtue of the statute, or by virtue of the relationship, assumed through the statute any right of inheritance from the adopted son such as a natural father would have. It is nowhere claimed that the adopting parent has any such right of inheritance as would a natural parent. It is not claimed anywhere that he is a 'parent' in the sense in which we commonly know that word. So far, therefore, it must be admitted by any reasoning mind that the one adopting is not the 'parent' of the adopted child in the sense that he takes under any statute or any law the right to inherit from the one whom he has adopted."

The majority opinion in that case proceeds on the assumption that this is true, and disposes of the question in the following language:

"It is also universally held, under similar statutes, that the person adopting a child does not thereby become capable of inheriting property from the child unless it is so provided in the statute."

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In the Kentucky statutes of descent and distribution appears a section which, as the Kentucky court has expressly held, deals not with the question of inheritance, but limits the estate of an infant in property received by it from a parent by gift, devise, or inheritance, and is as follows:

"If an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants." Ky. St., section 1401.

The court, after holding that an adoptive parent has no right in inheritance in the property of an adopted child by virtue of the Kentucky adoption statutes, proceeded to determine what effect this statute limiting the estate received by an infant from its parent had upon the controversy then before it, stating that:

"The question here is simply. What is the proper construction of the statute [referring to the adoption statute?] Was it intended to put the adopted child on the same footing as the natural child, and does he take his inheritance subject to the same limitations, if he dies in infancy and without issue?"

The court, after giving its reasons therefor, answered these questions by holding that since the adoption statutes provide that the adopted child shall inherit property from its adoptive parent, as though it were the child of such adoptive parent, its estate in the property so inherited is subject to the same limitation as the estate received from its parent by a natural child, and concluded its opinion as follows:

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"The statute [referring to the one limiting the estate of an infant in property received from its parent] does not make the foster father the heir of the adopted child. The case does not turn on the question. Who is capable of inheriting from the adopted child? It turns on the question, What estate does the adopted child who dies in infancy and without issue take in the estate of his foster parent? The adopted child under the statute is 'capable of inheriting as though such person were the child of the petitioner.' He, therefore, takes under the statute the same estate as the natural child. The estate of the natural child which he inherits from his parent is defeated by his death in infancy without issue, and the property then goes back to the kindred of that parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and when he dies in infancy and without issue, the property under the statute descends to the kindred of that parent from whom he received it."

How the majority of this court, in the case at bar, can understand that case to hold that an adoptive parent has the right in Kentucky to inherit property from the adopted child is beyond my comprehension; and that they will admit that the Kentucky statute, limiting the estate of an infant in property received from its parent by gift, devise, or inheritance, can have no operation in Mississippi I take for granted, in view of the two universal rules that title to real property must be determined by the law of the place where it is situated, and that statutes have no extraterritorial force. If the statute is to be applied here, it must also be applied as a limitation upon the estate of a natural child, born in Kentucky, in land situated in this state, received by it from one of its parents by gift, devise, or descent, a thingh which I suspect this court would not do. The fact that the supreme court of Kentucky has expressly

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decided that its adoption statutes confer no right of inheritance upon an adoptive father should close this inquiry; for no court has ever held, in so far as I am aware, that the construction placed upon a statute of a state by its own supreme court is not binding on the courts of every other state wherein rights claimed under such statute are called in question. 36 Cyc. 1104, and authorities there cited in note 4, among which is *McIntyre* v. *Ingraham,* 35 Miss. 25, in which this court said:

"No principle of law is of more universal acceptation, or stands upon sounder reason, than that the construction put by the proper courts upon the statutes of their own jurisdiction is conclusive of their force and effect, and will be so regarded by all foreign judicatures, when they may become the subject of consideration."

The estate which Lula May Rule took in the land inherited by her from her adoptive father was that which she would have taken had she been born to him in lawful wedlock, which under the law of this state is a fee simple; consequently upon her death the land was inherited under section 1649 of our Code by her brothers and sisters, and should be awarded to them, regardless of whether this court thinks that so to do would be in accord with natural justice or not, for that question is not for its determination, but for the determination of the legislature.

The case of *Humphries* v. *Davis,* 100 Ind. 274, 50 Am. Rep. 788, cited in the majority opinion, is of no value here for three reasons: First, that decision simply construed an Indiana statute, the phraseology of which is different from the Kentucky statute here under consideration, and, second, whether the construction put upon the Kentucky statute by the supreme court of that state is right or wrong, it should be accepted and acted upon here; and, third, the right of an adoptive parent

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to inherit land situated in a state other than that under the laws of which the child was adopted was not there involved. But since that case is cited with approval in the majority opinion, it may not be out of place for me to give it some consideration.

The statute there under consideration (Burns' Ann. St. 1901, sections 837, 838) after providing the method by which children could be adopted, continued as follows:

"From and after the adoption of such child, it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother. . . . After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education, and every other way responsible as a natural father or mother."

It came before the supreme court of Indiana for construction in *Barnhizel* v. *Ferrell,* 47 Ind. 335, and the court then held that it conferred no right on an adoptive parent to inherit property from the adopted child. In *Krug* v. *Davis,* 87 Ind. 590, it was conceded by counsel, and assumed by the court, that the statute conferred no such right, but when that case came again to the court on a second appeal, as *Davis* v. *Krug,* 95 Ind. 1, the court held that the question was not considered and decided by it on the former appeal, and was therefore not within the law of the case rule; that the statute did confer such right of inheritance on an adoptive parent—and overruled *Barnhizel* v. *Ferrell.* Afterwards, the right of the same adoptive parent to inherit from the same adopted child that was involved in *Krug* v. *Davis,* and *Davis* v. *Krug, supra,* came before the court in

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Humphries v. *Davis* in which the overruling of *Barnhizel* v. *Ferrell* was approved, the court construing its statute in the light of the civil law, and, as was pointed out by the supreme court of Iowa in *Baker* v. *Clowser,* 158 Iowa, 156, 138 N. W. 837, 43 L. R. A. (N. S.) 1056, basing its conclusion upon an erroneous premise. The reasoning of that court, from the *status* of an adopted child under the civil law, was repudiated by this court, as hereinbefore pointed out in *Beaver* v. *Crump,* 76 Miss. 34, 23 So. 432, and by the supreme court of Kentucky in *Villier* v. *Watson's Adm'x,* 168 Ky. 631, 182 S. W. 869. Among the numerous cases in which it has been held that an adoptive parent does not inherit property from the adopted child, unless the right so to do is expressly given by statute, are the following: *Baker* v. *Clowser,* 158 Iowa, 156, 138 N. W. 837, 43 L. R. A. (N. S.) 1056; *Reinders* v. *Koppelmann,* 68 Mo. 482, 30 Am. Rep. 802; *Heidecamp* v. *Jersey City, etc.,* 69 N. J. Law, 284, 55 Atl. 239, 101 Am. St. Rep. 707; *Hole* v. *Robbins,* 53 Wis. 514, 10 N. W. 617; *White* v. *Dotter,* 73 Ark. 130, 83 S. W. 1052; *Russell* v. *Jordan,* 58 Colo. 445, 147 Pac. 693, Ann. Cas. 1916C, 760; *Lathrop* v. *Young,* 25 Ohio St. 451; *Upson* v. *Noble,* 35 Ohio St. 655; *Edwards* v. Yearby, 168 N. C. 663, 85 S. W. 19, L. R. A. 1915E, 462; *In re Daisey's Estate,* 15 Wkly. Notes Cas. 403; *Murphy* v. *Portrum,* 95 Tenn. 605, 32 S. W. 633, 30 L. R. A. 263.

The California case cited in the majority opinion is of no value here, for the reason, as pointed out in the California court's opinion, the statute of that state there under consideration is materially different from the statutes of other states. The statute (Civ. Code, sections 228, 229) there construed, as was said by that court, does "not in terms provide for the inheritance by the adopted child from the adopting parent or *vice versa,*" but does provide that:

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" 'A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation. . . . The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it' " and was construed by the court to mean that, when a child is adopted under it, the relations between it and its natural parents are for all legal purposes superseded, and it thereafter becomes for all such purposes the child of the adoptive parents. The Kentucky statute expressly gives the child a right to inherit from its adoptive parents. Our statute provides that such right may be conferred upon it in the decree of adoption; but in neither of these statutes is a right in the adoptive parent to inherit from the child referred to, and therefore such a right cannot be held to be included therein without violating one of the most elementary rules of construction. "*Expressio unius est exclusio alterius.*" And, moreover, as hereinbefore pointed out, this court has held that under our statutes—and the Kentucky court has held under the Kentucky statutes—no such relation is created by the adoption of a child.

In conclusion I have only this further to say: That when this case was before us on the former appeal, we held, as has also the supreme court of Kentucky, that under the Kentucky statute under which Lula May Rule was adopted, her adoptive parents were given no right to inherit property from her, which holding, even if this court has the right to construe the Kentucky statute differently from what it has been construed by the Kentucky court, is supported by the decisions of all the courts which have construed statutes the phraseology of which is similar to that of the statute here under

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consideration; and yet that decision is to be overruled because a majority of this court now say that it is manifestly wrong.

I am requested by my Brother SYKES to say that he concurs in the views herein expressed.

ON SUGGESTION OF ERROR.

ETHRIDGE, J., delivered the opinion of the court.

The suggestion of error filed in this case challenges the power of the court to change the decision on the first appeal, on the ground of want of power in the court under constitutional grant of jurisdiction to the court; second, if the court had such power, that its exercise would violate the rules of *res adjudicata*, "for which neither a principle can be stated nor an authority produced;" third, that to make such a decree is to overrule an unbroken line of decisions in this state, recognizing and enforcing the law of the case.

The Constitution, in giving jurisdiction to the supreme court, uses the following language:

"The supreme court shall have such jurisdiction as properly belongs to a court of appeals." Section 146 of the Constitution.

In section 144 the general grant of judicial power is in the following language:

"The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in this Constitution."

It will be noted from these provisions that the entire judicial power of the state is vested in the supreme court and such other courts as are provided for in the Constitution. Section 146 has been construed to mean that the supreme court has only appellate jurisdiction, and that original jurisdiction cannot be conferred upon it. There is no limit of the appellate jurisdiction that

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may be conferred upon it under the Constitution. All power belonging to an appellate court may be conferred upon the supreme court, and there is no limitation in the Constitution on the power of the court to overrule decisions, or change its decision when in the opinion of the court a former decision may be erroneous or wrongful. No authority cited in the suggestion of error or brief refers to any constitutional restriction, and the constitutional power of the court to make decisions of the kind challenged in the suggestion of error has not been decided or adjudged in any of the authorities cited. The decisions cited wholly fail to sustain this contention. The court necessarily has power to decide an appeal and enter a final judgment.

On the second proposition, that if the court possesses such power the decision would violate the rule of *res adjudicata,* "for which neither a principle can be stated nor authority produced," is likewise not well taken. We think we have produced decisions in the former opinion sustaining the power and right of the court to change the decision. Other authorities could be cited, and among the decisions which have accomplished the same result, without making the pronouncement in terms, is *Field* v. *Middlesex Banking Co.,* 77 Miss. 180, 26 So. 365, which later came before the court on second appeal in 84 Miss. 646, 37 So. 139. On the first appeal Judge WOODS, as the organ of the court, used some strong language and reversed the case. On the second appeal, a majority of the court reversed the lower court, which followed Judge WOODS' opinion, and changed the effect of the decision on the first appeal. It is true that Judge WHITFIELD, one of the members of the court, undertook to show the same result could be accomplished without disturbing Judge WOODS' opinion; but the court did change the pronouncement of the law as it had been adjudicated on the first appeal. In Judge WOODS' opin-

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ion he stated that the record consists of three large volumes, and it was manifest that the facts were fully presented on the first appeal, but on the second appeal a different conclusion was reached on the facts. In *State* v. *L. & N. R. R. Co.*, 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150, and in the same case in 104 Miss. 413, 61 So. 425, the court declared the law applicable to the case and reversed the chancery court, remanding the matter to be proceeded with in accordance with the opinion therein pronounced. On the first remand the chancellor declined to follow the court, and in reversing him the second time in 104 Miss. 413, 61 So. 425, the law was again announced and reaffirmed as in the first opinion. Thereupon the chancellor entered a decision in conformity with the opinion of the supreme court. The case was thereupon appealed again to this court, and in 107 Miss. 597, 65 So. 881, the court changed ts announcement of the law, and reversed the chancellor, and entered judgment dismissing the suit.

Numerous authorities have been cited in the suggestion of error, most of which were referred to in the dissenting opinion in the present case, and in none of them is the precise case here dealt with presented. The only case that seems to sustain the contention of the suggestion of error is *Stewart* v. *Stebbins*, 30 Miss. 66. That case, however, is distinguishable from this case, because the former decision was not in the same case. But the rights growing out of the suit had been adjudicated in the case of *Stebbins* v. *Niles*, 25 Miss. 267, and which had, therefore, been finally adjudicated, and constituted *res adjudicata*, properly speaking, and as distinguished from the law of the case. It is true that the court in the case reported in 30 Miss. 66, uses language that would support the contention; but the language used was not applicable to the facts of the case. In other words, it was broader than the case called for. The decision, ap-

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plied to the facts of the case on which it was decided, was perfectly proper; but the statement of the court in th opinion, "that it is mmaterial in this respect whether the case was further proceeded with in the court below or not," was not before the court, and is not authority for the proposition here cited.

The names of great judges of the past, who have adorned this court, have been brought into honored review, in the suggestion of error, as great names in the judicial history of this state. We revere the memory of these judges, and have great respect and deference for their decisions. Able and eminent as these judges were, they were human and fallible, and, while we would not lightly depart from rules laid down by them, still we must, where they have decided cases which operate to effect injustice or lead to wrong results, apply the corrective as though we had rendered the same decisions. We do not intend to depart lightly from precedents. We expect to consider and adhere to them where they are sound in principle; but we refuse to crucify justice on the cross of precedent. We do not think the language used in our opinion, "when judicial construction is out of harmony with natural justice the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail," and "courts are created, maintained, and sworn to administer justice and not to adhere strictly to arbitrary rules; when a rule or decision defeats justice or seriously impairs it, it should be departed from rather than followed," is such radical language as need frighten the members of the bar. There may be those who love consistency of utterance and of precedent more than they do the administration of justice, but in our opinion the courts were created solely for the purpose of administering justice. We recognize that precedents are valuable guides, and it is not our purpose to throw them aside entirely and to proceed and blaze a new trail from our personal sense of right and

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justice. The decisions of the courts are not necessarily unchangeable, and it is the duty of the court to change a decision, if wrong in principle, and which leads to injustice and wrong.

The first appeal, in the present case, was from an interlocutory decree, and not from a final decree. Important as it is for the court to adhere to rulings made in settling the principles of litigation before final decree or judgment, it is more important that justice be done; and where the court reached the conclusion that a decision is manifestly wrong, and ought to be overruled, we see no reason to hold a litigant irrevocably bound to the court's mistake. If a mistake is made, it would be better to correct it at once, while injustice may be prevented. A litigant has no vested interest in a court's mistake, where the mistake is discovered before the final ending of the litigation.

We are satisfied with the pronouncement in our former opinion on the third proposition above laid down in the suggestion of error, without adding to it.

Suggestion of error is overruled.

SMITH, C. J., and SYKES, J., dissenting.

METROPOLITAN CASUALTY INS. CO. OF NEW YORK v. SULLIVAN.

[75 South. 370, Division A.]

1. APPEAL AND ERROR. *Stenographer's notes. Order extending time. Validity. Statute.*

Under chapter 111, Laws 1910, section 797, par. D. the trial judge has the power to extend the time within which a stenographer may file a transcript of the evidence sixty days in addition to the original sixty days allowed him therefor by the statute, and an order granting an extension of more than sixty additional days

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was valid to the extent of the additional sixty days which the judge had the power to grant.

2. SAME.

The statute also provides that in case the stenographer failed to file a transcript the appellant should have forty days after the expiration of the sixty days allowed the stenographer by law or after the expiration of any extension of time lawfully granted, in which to prepare and present to the judge a bill of exceptions in the case as if there had been no stenographer therefor, and in such case as an order granting the stenographer more than sixty days additional was valid to the extent of sixty days additional time, a bill of exceptions filed within forty days after such sixty days additional time complied with the statute, and would prevent the bill of exceptions from being stricken from the record.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit between the Metropolitan Casualty Insurance Company of New York and J. B. Sullivan, on motion to strike bill of exceptions.

The facts are fully stated in the opinion of the court.

Brown & Anderson and *J. E. Holmes,* for appellant.

Whitfield & Whitfield, for appellee.

SMITH, C. J., delivered the opinion of the court.

The evidence in this cause was taken down by a stenographer, but before he transcribed his notes they were stolen and were never recovered. Notice to transcribe his notes was served on the stenographer on the 2d day of October, 1916, and on the 29th of November, following, he was granted by the trial judge ninety days from that date within which to file a transcript of his notes, but, as these notes were lost, this transcript was never made. On the 9th day of February, 1917, the circuit judge approved a memorandum of the evidence prepared and filed with him by counsel for appellant. The cause

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now comes on to be heard on motion of appellee to strike this document from the record, which document his counsel admit to be a bill of exceptions, of the character to be filed in cases wherein the evidence was not taken down by an official stenographer, but claim that it was filed after the expiration of the time allowed therefor.

Under chapter 111, Laws of 1910, section 797, par. "d," p. 95, the trial judge has the power to extend the time within which a stenographer may file a transcript of the evidence sixty days in addition to the original sixty days allowed him therefor by the statute, and while in the case at bar the extension of time granted the stenographer was for more than sixty additional days, the order was not void, but valid to the extent of the additional time which the judge had the power to grant, to wit, sixty days, which, added to the sixty days originally allowed the stenographer by the statute, gave him one hundred and twenty days from October 2, 1916, within which to file a transcript of the evidence. This statute also provides that, in case the stenographer fails to file a transcript of the evidence, the appellant shall have forty days after the expiration of the sixty days allowed the stenographer by law, or after the expiration of any extension of time, which may have been lawfully granted the stenographer by the trial judge, in which to "prepare and present to the judge the bill of exceptions in the case as if there had been no stenographer therefor." In the case at bar a bill of exceptions, which we are by this motion requested to strike from the record, was not only presented to, but was also approved by, the trial judge within forty days after the expiration of the sixty days' additional time obtained from him by the stenographer. Consequently the statute was complied with (*Cato* v. *Crystal Ice Co.*, 108 Miss. 667, 67 So. 155), and the motion must be, and is, overruled.

Overruled.

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D. S. PATE LUMBER CO. v. SOUTHERN RY. CO. IN MISSISSIPPPI.

[76 South. 481, Division A.]

LIMITATION OF ACTIONS. *Statute applicable. Implied contracts.*

The limitation of three years provided by section 3099, Code 1906, governs in an action by a railway company to recover freight charges, where the writings introduced in evidence do not set forth the terms of any contract entered into between the parties thereto, but simply show that the railway company collected from the shipper a less sum of money for transporting lumber than under the law it should have done by reason of which the law imposes an obligation upon the shipper to account to the railway for the difference between the money which it actually paid and that which it should have paid, thereby giving rise to a contract the terms of which were not express, but only implied by law.

Appeal from the circuit court of Lowndes county.

HON. T. B. CARROLL, Judge.

Suit by the Southern Railway Company in Mississippi against D. S. Pate Lumber Company. From a judgment for plaintiff, defendant appeals.

The railway company brought this action in the court below to recover freight charges alleged to be due on carload shipments of lumber from points in Alabama to points in Illinois and other states, via Columbus, Miss. where it was dressed in transit. The suit was brought more than three years and less than six years after the charges fell due; and defendant pleaded the three-year statute of limitation of Mississippi. The three-year statute (section 3099, Code Miss. 1906) is as follows:

"Actions on an open account or stated account not acknowledged in writing, signed by the debtor's, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

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On delivery of each shipment to the planing mill at Columbus, Miss., the lumber company was required to pay the freight charges at the local rate from its point of origin in Alabama to Columbus. After each shipment of lumber was dressed, it was redelivered to the railway company to be forwarded to its destination; and thereupon, according to a provision in the applicable interstate tariff, the through rate from the point of origin in Alabama to the point of ultimate destination in Illinois, or other state, was charged against the shipment, and the railway company was required to refund to the lumber company such proportion of the freight charges from point of origin in Alabama to Columbus, Miss., as the weight of the shipment forwarded from Columbus after being dressed bore to its weight when it was shipped to Columbus in the rough, less a charge for the dressing in transit privilege. It was that part of the tariff providing for this refund the misconstruction of which the railway company alleged resulted in over payments to the lumber company, and therefore in the undercharges for which the railway company sued. The refunds were made by drafts drawn by the agent of the railway company at Columbus in favor of D. S. Pate Lumber Company and indorsed and collected by the lumber company.

The lumber company itself made out the bills of lading on the usual forms upon forwarding the dressed shipments of lumber from Columbus; and they were signed both by the lumber company and the railway company. Neither the weights of the outbound shipments nor the rate were inserted in the bills of lading, but they contained the following:

"Received subject to classifications and tariffs in effect on the date of issue of this original bill of lading."

Copies of the bills of lading were introduced in evidence by the plaintiff, without objection, on the ground that they were copies; the originals having been deliv-

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ered to the defendant lumber company, and not being available.

The writings which the court held to be insufficient to take the case out of the three-year statute of limitation were: (1) The bills of lading; (2) extracts from the tariffs showing the applicable rates and provisions, duly certified by the secretary of the Interstate Commerce Commission; (3) the waybills issued at the points of origin in Alabama covering the transportation of the rough lumber to Columbus, Miss., showing, among other things, the weight of the lumber and the rate at which freight was collected at Columbus for transportation from the points in Alabama to Columbus; (4) the waybills issued by the railway company at Columbus, showing the weight of the shipments after being dressed when they were forwarded from Columbus to points in other states; (5) the drafts drawn by the railway company's agent at Columbus on its treasurer for the amounts refunded on the several shipments, properly indorsed by the lumber company, and paid by the railway company.

The lumber company was not a party to the waybills. They were issued by the railway company for the information of its own conductors and agents.

W. C. Meek, for appellant.

The authorities all cited by plaintiff were not in point at all on their contention. There was no written contract at all in the case of any sort or kind at all. Simply a suit on an open account for the difference paid and no notes or writing of any kind whatever, no writing or promise in writing to pay or binding to do so in any way. Plaintiff cannot find any case in America or in England sustaining its contention, for there is none. (See Mississippi Code of 1906, sections 3099, 3100, 3115, 3118.) *Yazoo & Mississippi Valley Railroad Company* v. *Willis*; *Foote* v. *Farmer,* in 71 Mississippi Reports,

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on page 148 to 150; 49 Mississippi, page 480; *Beck* v. *Beck,* in 7 George, Mississippi Reports, page 72.

This is a suit on an open account pure and simple, and was barred in three years. A suit for rebates, refunds to recover same for the difference paid and what should have been paid by payments being made in checks or drafts makes no difference. This does not make it a contract in writing at all. 32 Mississippi, page 622; 33 Mississippi, page 41; 62 Mississippi, page 71; 12 Smedes & Marshall Reports, page 663; 24 Mississippi, pages 389 and 392; 28 Mississippi, page 361; 30 Mississippi, page 171; 14 Smedes & Marshall, page 52; 14 Smedes & Marshall, page 52; 55 Mississippi, page 52; 55 Mississippi, page 146.

Carl Fox, for appellee.

It is hardly necessary to cite authorities that there is no escape from the payment of freight charges at the rate prescribed by the tariffs. *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94 L. R. A. (N. S.) 1915E, 665; *Atchinson, T. & S. F. R. Co.* v. *Bill* (Okla.), 120 Pac. 987, 38 L. R. A. (N. S.) 351 and note; *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 567; *Chicago & A. R. Co.* v. *Kirby,* 225 U. S. 155; *Armour Packing Co.* v. *United States,* 209 U. S. 56; *Texas & Pac. R. R. Co.* v. *Mugg,* 202 U. S. 242; *Schenberger* v. *Union P. R. Co.* (Kan.), 113 Pac. 433, 33 L. R. A. (N. S.) 391, and note; *New York, N. H. & H. R. R. Co.* v. *York & Whitney,* 215 Mass. 36, 102 N. E. 366; *Ga. R. Co.* v. *Creety,* 5 Ga. App. 424, 63 S. E. 528; *Central R. R. of N. J.* v. *Mauser,* 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92, and the note to this case in L. R. A. (N. S.), which is very full; *Carter Planing Mill* v. *N. O. M. & C. R. R. Co.,* —— Miss. ——, 72 So. 884; *Yazoo & Miss. V. R. R. Co.* v. *Willis,* 111 Miss. 303, 71 So. 563; *Kan. City Sou. Ry. Co.* v. *Carl,* 227 U. S. 639, 645; *Louisville & Nashville*

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R. R. Co. v. *Maxwell,* 237 U. S. 949; *Georgia, Florida and Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, 197; *Phillips Co.* v. *Grand Trunk Western Ry. Co.,* 236 U. S. 662-667.

The only other question which we desire to discuss is the statute of limitations. The obligation of the Lumber Company is provable by the bills of lading issued for dressed lumber out of Columbus, and the drafts drawn by the agent of the Railway Company at Columbus on the Railway Company's assistant treasurer at Mobile payable to and endorsed by the Lumber Company or its agent. The Lumber Company itself made out these bills of lading and presented them to the Railway Company's agent for execution, and they were signed by the Lumber Company as well as by the Railway Company.

The defendant pleaded section 3099 of the Code of 1906, the three years' statute of limitations: "Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued and not after."

This suit is not based upon any open account; each transaction is separate and distinct and would have been closed when the refunds were paid by the railway company's draft but for the error in the construction of the tariff. The Lumber Company did not have an account with the Railway Company. It paid cash for what it received and likewise when the Railway Company's turn came to pay, it did not ask for credit. If the three years' statute applies, it is because this suit was brought on an unwritten contract, express or implied."

Vicksburg Water Works Co. v. *Yazoo & M. V. R. R. Co.,* 102 Miss. 504, 53 So. 825; *Cocke v. Abernathy,* 77 Miss. 872, 28 So. 18, was a suit by a principal against the estate of his attorney-in-fact for money collected by the latter

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and not paid over. The only written evidence of the claim was a receipt for money given by the attorney-in-fact to the person from whom it was collected.

The court said: "The claim is not barred by the statute of limitations of three years, because the liability of Robinson (attorney-in-fact) is provable by writing." *Masonic Benefit Association* v. *First State Bank,* 97 Miss. 610, 55 So. 408.

In *Fowlkes* v. *Lea,* 84 Miss. 509, 36 So. 1036, 68 L. R. A. 925, it was held that the recital of a consideration in a deed which had not been paid was a promise in writing by the grantee to pay the consideration, although the deed was not signed by the grantee, and that the three years' statute did not apply.

In *Yazoo & M. V. R. R. Co.* v. *Willis,* 111 Miss. 303, 71 So. 563, suit was brought for freight charges on an interstate shipment more than six years after the charges accrued. This court held that the state statutes of limitation applied, and apparently had in mind the six years' statute, although it was not expressly decided whether the three years' or the six years' statute was applicable.

In *Illinois Central Ry. Co.* v. *Jackson Oil Etc., Co.,* 111 Miss. 320, 71 So. 568, it was held that the six years' statute and not the three years' statute was applicable to a suit for loss of cotton seed in transit for which a bill of lading had been issued by the Railway Company. It was argued that the contract of shipment was indefinite because the weight or amount of seed was not stated. In reply to this the court said: "It makes no difference whether the bill of lading stated the number of pounds constituting the car load or not." And again: "This promise is in writing and is the foundation of the action." We think there is nothing peculiar to this cause which takes it out of the rule established by the foregoing decisions.

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Sturdivant, Owen & Garnett, for appellee.

We will consider the fourth and fifth assignments of error together, as they embrace practically the same contention; that is, whether the three year or six year statute is applicable to this cause.

Sections 3097 and 3099 of the Mississippi Code of 1906 are as follows: "3097. (2737) Actions to be brought in six years. All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action."

"3099. (2739) Actions to be brought in three years. Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued and not after." Case of *Masonic Benefit Association* v. *First State Bank,* 55 So. 408, it seems to us is conclusive that in this case; the six year statute and not the three year statute applies. *Washington* v. *Soria,* 73 Miss. 665, 19 So. ——; *Foulkes* v. *Lee,* 84 Miss. 509, 36 So. 1036; *Cock* v. *Abernathy,* 77 Miss. 872, 28 So. 18, 25 Cyc. 1041; *Y. & M. V. R. Company* v. *Willis,* 71 So. 563; *Illinois Central Ry. Co.* v. *Jackson Oil & Refining Co.,* 71 So. 568.

We submit that the six year statute applies under the facts in the case at bar, and that appellee has proved its case "by writing."

SMITH, C. J., delivered the opinion of the court.

We are of the opirion that the limitation of three years provided by section 3099, Code of 1906, governs; for the reason that the writings here in question, taken singly or collectively, do not set forth the terms of any contract entered into between the parties thereto, but simply show that appellee has collected from appellant a less sum of money for transporting lumber than under the law it

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should have, by reason of which, we will assume, the law imposes an obligation upon appellant to account to appellee for the difference between the money which it actually and that which it should have paid, thereby giving rise to a contract, the terms of which are not express, but are implied by law, so that the case comes squarely within *Buntyn* v. *Building & Loan Ass'n.* 86 Miss. 454, 38 So. 345.

Reversed, and judgment here for appellant.

MERCHANTS & FARMERS BANK OF STARKSVILLE v. NORMENT.

[76 South. 482, Division B.]

1. EQUITY. *Decree. Amendment. Evidence.*

Under section 1016, Code 1906, providing that, when there shall be among the records of the proceedings any docket or memoranda by the chancellor whereby a judgment or decree may be safely amended, it shall be the duty of the court to amend such judgment or decree, it was not error for a trial court to overrule an application to amend a final decree, where although the former chancellor of the district stated in testifying that he made a pencil memorandum of his calculations at the time he prepared the final decree, these alleged notes of the chancellor were not made a part of the petition as an exhibit or otherwise and were not in the possession of the witness at the time he testified and were not in court when the motion was heard and had never been "among the record of the proceedings."

2. BANK AND BANKING. *Action against president. Evidence. Agreement dismissing appeal.*

Where the president of a bank had taken up his own loan with the money of the bank with knowledge of the infirmities of the title and the bank had been unable to realize in full on the loan because of the title set up by others, an agreement to dismiss the appeal from the decree adjudging that the bank had knowledge of the infirmities in the title was admissible in a suit in which the bank sought to hold the president liable for making such loan.

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3. SAME.
In such case it was error to attach to the decree in the suit, by which the bank sought to hold the president liable for making the loan the condition that so long as the former suit between the bank and the others was pending, no liability should rest or be vested.

4. SAME.
In such case the decree in the suit between the bank and the others, adjudging that the bank had knowledge of the infirmities in the title, was admissible in the suit in which the bank sought to hold the president liable for making the loan.

5. BOND TO RELEASE MONEY. *Judgment.*
Where in a suit by a bank against its president the bank prayed in its bill that the money of its president in the bank should be applied to the indebtedness due it by him and the president had given a bond for the release of this money, a decree was erroneous which failed to give judgment on such bond.

APPEAL from the chancery court of Oktibbeha county.

HON. A. J. MCINTYRE, Chancellor.

Suit by the Merchants' & Farmers' Bank of Starksville against James W. Norment. From a decree overruling complainant's petition to correct the decree for complainant and from the decree sought to be corrected, it appeals.

Montgomery v. *Bell,* No. 1984, in Oktibbeha county chancery court, indirectly involved in this cause, was a suit brought by certain of the heirs of Mrs. Jenny Bell against appellant, the Merchants' & Farmers' Bank of Starkville, Miss., and others, assailing a deed of trust held by that bank on seven hundred and twenty acres of land involved in that suit. Before the death of Mrs. Jenny Bell she and her husband, M. C. Bell, executed a deed of trust to Mrs. Gertrude Carroll, the wife of Judge T. B. Carroll, who was her agent, to secure a certain sum of money. Mrs. Jenny Bell and her husband both died before the money was paid, the former leaving nine heirs at law by her husband, M. C. Bell, and M. C. Bell also having two other children by a former wife. Most of the

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children of Jenny Bell were minors and dependent on their elder brothers for their support, and Judge Carroll suggested that his wife's mortgage be foreclosed and the title vested in the two older brothers for the benefit of the younger children. This was done, and the title vested in the older brothers, E. B. and R. M. Bell, who executed another mortgage for the money secured on the land. In the meantime Mrs. Cowan, the grandmother of Jenny Bell's children, having some money of her own, paid Judge Carroll part of the money due his wife, and entered into a written agreement to pay the remainder if time should be given them. Later on, after this agreement was executed, E. B. and R. M. Bell procured J. W. Norment to take up the mortgage held by Judge Carroll for his wife, Mrs. Cowan having died without paying it in full. Judge Carroll notified Mr. Norment that E. B. and R. M. Bell were not the real owners of the land, but only tenants in common and holders of the legal title for the minor children of Jenny Bell, and gave him a copy of the agreement with Mrs. Cowan. Mr. Norment later became the organizer and first president of the Merchants' & Farmers' Bank, appellant. And afterwards, about 1908, he made a loan of the bank's money, he being the attorney and creditman of the bank, to W. C. Bell on the seven hundred and twenty acres of land, W. C. Bell being the brother of E. B. and R. M. Bell, to whom they had deeded the land for a nominal consideration of one hundred dollars, which was never paid. Mr. Norment, failing in health, went to New Mexico, and afterwards the bank's other officers who succeeded him, having no knowledge of the infirmity of the title, renewed the loan to W. C. Bell for a larger sum of money. The bank was about to foreclose the loan given them by W. C. Bell, who had full notice of the claims of the minor heirs, when the minor heirs brought suit against the bank, asking that its security be limited to the small interest in the land of E. B., R. M., and W. C. Bell, and that the land be sold for division. Much testimony was taken *pro* and *con,* Mr. Norment de-

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nying knowledge of all interest of minor heirs, but Chancellor ROBINS, who decided the cause, held that the bank was charged with full knowledge of the infirmities of the title through its legal functionary and president, James W. Norment. In the decree the bill was sustained, and the interests in the lands owned by E. B., R. M., and W. C. Bell was set apart to the bank and sold under its mortgage for the sum of four hundred dollars, leaving a large indebtedness due it.

II. Suit was immediately brought by the Merchants' & Farmers' Bank in the chancery court of Oktibbeha county against James W. Norment, then living in New Mexico, where he had gone for his health, which cause is No. 2153 on the chancery docket of Oktibbeha county. The bank also had on deposit at the time nearly five hundred dollars to the credit of J. W. Norment, which it asked to be applied to the indebtedness due it by him. The bank charged that James W. Norment, while its president and loan officer and attorney, with full knowledge that W. C. Bell was only a tenant in common of the said seven hundred and twenty acres of land, made a large loan to him secured by the land, using the bank's money, a large portion of which was lost; that with this money Mr. Norment paid himself off a personal loan he had made W. C. Bell, secured on this land, with full knowledge of the minors' interests therein. In this loan the papers in evidence in the cause of *Montgomery* v. *Bell*, No. 1984, were introduced at the hearing which was had before Chancellor Lamb. Before the two years expired after the final decree in cause No. 1984 the bank filed an appeal bond, which was a very short while before the trial in the present suit; accordingly Judge LAMB, who had succeeded Judge ROBINS, as Chancellor, ruled out the record and papers in *Montgomery* v. *Bell* because he said that cause was not finally settled, establishing the loss by the bank, since an appeal was pending. The bank, so as to avoid this objection, immediately entered into an agree-

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ment with the attorneys of the Bell heirs who were complainants in that suit, and by agreement dismissed the appeal. In the trial of the *Merchants' & Farmers' Bank* v. *James W. Norment* involved in this appeal much additional testimony was taken besides that used in the cause of *Montgomery* v. *Bell,* but James W. Norment did not take the stand in the latter trial. Pending the litigation Mr. Norment gave bond for the money deposited in the Merchants' & Farmers' Bank and drew it out, and also by his bond relieved all the garnishees who were parties to the bill and who were his debtors from answering, and by agreement the bond was to stand in the stead of the money in the bank and to protect the complainant bank to the extent the garnishees were indebted to Norment. After the cause was heard and argued before Chancellor Lamb, he took the case under advisement, and rendered a decree in vacation only a day or two before he went out of office, which decree he prepared himself, and which the counsel on neither side had seen, and by which decree he sustained the bill of the *Merchants' & Farmers' Bank* v. *Norment,* rendering a decree in favor of the bank for one hundred and ninety-four dollars and sixty-six cents. Judge LAMB in rendering his decree also conditioned the recovery of the one hundred and ninety-four dollars and sixty-six cents, upon the Merchants' & Farmers' Bank appearing in the supreme court and there dismissing the appeal it had taken in the cause of *Montgomery* v. *Bell,* No. 1984. He made no disposition of the five hundred dollars in appellant bank, nor did he mention the bondsmen on Norments' bond.

III. Complainant bank, learning of this oversight of Judge LAMB, filed a petition, to which it made all the bondsmen on the forthcoming bond given by Norment parties, giving them notice as well as Norment, to appear at the next term of court and show cause why the mistake of Judge LAMB in leaving out the five hundred dollars from his decree should not be corrected, and

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why the bondsmen should not in the decree be made to answer for the judgment which was rendered against Norment by Chancellor LAMB and for which they gave the bond. At the hearing of this petition Judge A. J. McINTYRE was chancellor, and Judge T. L. LAMB, the former chancellor, was a witness. He testified to his oversight, showing that the papers were not present before him, and he explained that he did not render a decree for appellant for the five hundred dollars because he thought it still had the money in its own hand, and accordingly he charged it with it. He also stated that the calculation by which he reached the amount, for which he gave a decree for complainant, was then at home among his papers, that that was not present in court, but he testified that it showed that the five hundred dollars was charged up to the bank, and a decree was not given for the five hundred dollars because it was supposed the bank had it. Judge MCINTYRE overruled the petition to correct the decree in any part, and the bank appealed from his decree, overruling the petition to correct Judge LAMB's final decree and also from the final decree in which he rendered judgment in favor of the bank against J. W. Norment for only one hundred and ninety-four dollars and sixty-six cents. The testimony heard in the original suit of *Montgomery* v. *Bell* and the suit now appealed to which the record in that case was made an exhibit constitutes five large bound volumes, and involves much conflicting evidence *pro* and *con*, a longer abstract of which it is deemed unnecessary to give, it being sufficient to state that Chancellor ROBINS found in *Montgomery* v. *Bell*, No. 1984, that the bank was charged with full knowledge of the infirmities of title in the seven hundred and twenty acres of land which the court held was in the mind of J. W. Norment when, while representing the bank, he made the loan. In the present suit Chancellor LAMB decided for the complainant, the Merchants' & Farmers' Bank, and

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against James W. Norment, and found that he should be responsible for a portion of the bank's loss which it had suffered, because he had taken up his own loan with the bank's money, with knowledge of the infirmities of the title. The evidence *pro* and *con* on these various issues was resolved by the decree in favor of the appellant the Merchants' & Farmers' Bank.

Leftwich & Tubb, for appellant.

Gates T. Ivy, for appellee.

STEVENS, J., delivered the opinion of the court.

There was no error on the part of the trial court in overruling the application to amend the final decree. The petition was filed under section 1016, Code of 1906, and the only testimony in support of the petition was the oral testimony of the former chancellor of the district. It is true the chancellor, in testifying, stated that he made a pencil memorandum of his calculations at the time he prepared the final decree, but these alleged notes of the chancellor were not made a part of the petition as an exhibit or otherwise. They were not in possession of the witness at the time he testified, and were not in court at the time Chancellor MCINTYRE heard the motion. It does not appear that this memorandum had ever been "among the records of the proceedings." The chancellor was justified in declining to sustain the motion to correct the final decree; at least we cannot reach the conclusion that he was manifestly wrong.

On the merits, the decree appealed from should be reversed, and the cause remanded for a new trial. Error was committed in excluding the agreement dismissing the appeal in cause No. 1984, especially in view of the ruling of the court making the final decree that was rendered in the present suit conditioned on the prosecu-

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tion of the appeal in the former case, No. 1984. It was, in our judgment, error to attach any conditions whatever to the decree finally rendered by the court, to the effect, so long as an appeal of the former suit was pending, "that no liability shall rest or be vested by this decree, because there could be no measure of liability in this case so long as that case is pending." Recovery in the instant case should be based upon the proof, and the decree, as to its terms, should be definite and final. We see no error in permitting the record in cause No. 1984 to be introduced as a part of the evidence in the present case.

It appears to us that the learned chancellor before whom this cause was tried resolved the facts in favor of appellant, but that his decree fails to take account of the four hundred and eighty-three dollars and ten cents to the credit of appellee Norment in the bank at the time this suit was filed. After the institution of this suit, appellee had given bond, and on the faith of this bond had been permitted to withdraw these funds. The final decree does not mention this bond, and we see no reason why the chancellor did not permit recovery on the bond. In the oral testimony of the chancellor taken upon the motion to correct the decree, he states that:

"He credited Mr. Norment with five hundred dollars that was shown by the proof to have been in the bank; . . . there being no bond of any kind in reference to this matter introduced in the trial or my attention called to the fact."

Of course, this oral testimony of the chancellor is not controlling here in our analysis of the facts, but in a court of equity it should at least point us to the testimony and prompt us not too strongly to indulge the presumption that the decree of the chancellor in the present case is correct. Here the chancellor frankly admits a mistake in calculation. It is not clear just how the chancellor arrived at the sum of one hundred and

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ninety-four dollars and sixty-six cents, the amount of the final decree. Even though the chancellor had intended to award recovery for only one hundred and ninety-four dollars and sixty-six cents, appellant was entitled to a judgment upon the bond for this amount. The bond was given in consideration of a release of the garnishments, and the express condition of the bond is that appellee "shall settle and pay and discharge and comply with any and all judgments and decrees that may be rendered against him in the aforesaid cause." The decree appealed from will be reversed, and the cause remanded for a new trial.

Reversed and remanded.

BRICKELL ET AL. v. LIGHTCAP ET AL.

[76 South. 489, Division B.]

1. EXECUTORS AND ADMINISTRATORS. *Sale of land. Existence of personalty.*

Under Code 1906, section 2075, authorizing a sale of land in preference to personalty where the court is satisfied that it would be to the interest of the distributees or legatee, the chancery court has jurisdiction on petition of an executor to decree a sale of realty, part of the *corpus* of the estate, where all necessary parties are before it, whether the property is devised by will or descends by operation of law.

2. EXECUTORS AND ADMINISTRATORS. *Sale of realty. Parties interested. Annuitants. Contingent remaindermen.*

Under Code 1906, section 2079, providing that on petition to sell lands to pay debt of a decendent all parties interested shall be cited, and section 2056, charging lands of a decedent with the payment of his debts if the personalty is insufficient and section 2075 providing for a sale of realty in preference to personalty in certain instances, where a testator devised a residue of his property in trust to pay a certain sum out of the rents and profits to his son and his wife for life, without anticipation or liability

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for their debts, and provided that on the death of the survivor the trust should terminate and the property should vest in their children and the descendants of their children, and on the death of the son without children, in testator's right heirs, and gave the trustees power to manage and sell. In such case on the petition of the executor for a sale of the realty, since the *cestui qui trust* were represented by the trustee neither they nor the contingent remainderman were owners or "parties interested," entitled to summons under the statute.

3. WILLS *Construction.*
In constructing a will the court should look to the general scope and purpose and the entire language employed.

4. TRUSTS. *Testamentary trustee. Sale of land. Fraud. Presumption.*
The fact that a trustee, acting with the executor and another trustee in petitioning for a sale of realty to pay debts, had a probated account against the estate, was not sufficient to show fraud, since his good faith will be presumed.

APPEAL from the chancery court of Yazoo county.
HON. O. B. TAYLOR, Chancellor.

Bill by H. H. Brickell and others against H. B. Lightcap and others. From a decree dismissing the original and amended bill, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Holmes & Holmes, W. A. Henry, E. L. Brown, Mayes & Mayes and *J. B. Harris,* for appellants.

1. This is a direct attack upon the decree, and not a collateral one, as will be contended by the counsel for appellees, in the extremity of their situation; and the bill answers every purpose, and contains the necessary averments, of a bill of review. *McKinney* v. *Adams,* 95 Miss. 832, 50 So. 474; Words and Phrases, pp. 1249, 1250; Barton's Suit in Equity, p. 154.

2. If there be no persons *in esse* who are the ultimate limitees of this property, as contended for by counsel for appellees and held by the chancellor, then John F. Powell must have been served with process in order to

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cut off his unborn children, contingent limitees, and the collateral kin of the testator must have been so served in order to cut off their unborn progeny, contingent limitees, under the doctrine of virtual representation. Note, 97 Am. St. Rep. 762; note, 8 L. R. A. (N. S.) 49; *Hale* v. *Hale,* 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

3. If John F. Powell, or the collateral kin of the testator living at his death, be contingent remaindermen, or if John F. Powell, or such kin, be reversioner, or reversioners, of the estate, then he or they must have been served with process. Story's Equity Pleading, section 149; *Cannon* v. *Barry,* 59 Miss. 289; *Prewett* v. *Land,* 36 Miss. 495; *Culley* v. *Elford,* 187 Ala. 165, 65 So. 381; *Farr* v. *Gilreath,* 23 S. C. 502.

4. John F. and Virginia Powell, as the mere annuitants, being legatees with a charge upon the property, must have been served with process, and this whether, technically speaking, they had an estate in the lands or not. *Cady* v. *Cady,* 67 Miss. 431, 7 So. 216; *Knotts* v. *Bailey,* 54 Miss. 235, 28 Am. Rep. 348; *Peebles* v. *Acker,* 70 Miss. 359, 12 So. 248; *Heatherington* v. *Lewenberg,* 61 Miss. 372; *Turner* v. *Turner,* 57 Miss. 775; *Perkins* v. *Bank,* 81 Miss. 358, 33 So. 18.

5. As mere legatees with an interest in the income, John F. and Virginia Powell, in equity, have an interest in the land, or a property right in the use devised to them, and must have been served with process. *Prewett* v. *Land,* 36 Miss. 495; *Leigh* v. *Harrison,* 69 Miss. 923, 11 So. 604, 18 L. R. A. 49; *Williams* v. *Owen,* 116 Ind. 71, 18 N. E. 389; *Myers* v. *Cullum,* 152 Ind. 700, 51 N. E. 918; *Grueber* v. *Lindenmeier,* 42 Minn. 99, 43 N. W. 964; *Wellington* v. *Janvrin,* 60 N. H. 174; *Currier* v. *Janvrin,* 58 N. H. 374; *Stancel* v. *Calvert,* 60 N. C. 104.

6. The trustees took exactly that quantity of interest necessary to the execution of the trust; and the language used will not be restrained or limited so as to

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invest them with that exact quantity. *Arnold* v. *Railway Co.*, 58 Tex. Civ. App. 186, 123 S. W. 1162; *Allen* v. *Hughes*, 106 Ga. 775, 32 S. E. 927; *Luquire* v. *Lee*, 121 Ga. 624, 49 S. E. 834; *Johnson* v. *Cook*, 34 Ala. 150; *Nelson* v. *Davis*, 35 Ind. 474; *Brillhart* v. *Mish*, 99 Md. 447, 58 Atl. 28; *Young* v. *Bradley*, 101 U. S. 782, 25 L. Ed. 1044; *Ward* v. *Bradbury*, 18 Beav. 190; *Temple* v. *Ferguson*, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. Rep. 791; *Clark* v. *Foster*, 110 Miss. 543, 70 So. 583; *Hawker* v. *Hawker*, 3 Barn. & Ald. 537; *Dean* v. *Munnally*, 36 Miss. 358; *Andrews* v. *Brumfield*, 32 Miss. 115; *Murdoch* v. *Murdoch*, 97 Miss. 693, 53 So. 684; *Whitfield* v. *Thompson*, 85 Miss. 760, 38 So. 113; *Cady* v. *Lincoln*, 100 Miss. 765, 57 So. 213; *Rives* v. *Burrage*, 110 Miss. 789, 70 So. 893; *Cohea* v. *Jamison*, 68 Miss. 510, 10 So. 46; *Mallory* v. *Clark*, 9 Abb. Prac. (N. Y.) 358; *Williams* v. *Tozer*, 185 Pa. 302, 39 Atl. 947, 64 Am. St. Rep. 650; *Woodrop* v. *Weed*, 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832; *Rembert* v. *Key*, 58 Miss. 536; *Farr* v. *Gilreath*, 23 S. C. 502; *Cannon* v. *Barry*, 59 Miss. 289; *Prewett* v. *Land*, 36 Miss. 495; Culley 1. Elford, 187 Ala. 165, 65 So. 381; Story, Eq. Pl. section 149; *Hale* v. *Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Smith* v. *Gaines*, 39 N. J. Eq. 545; *Ex parte Lyman*, 11 R. I. 157; *Kolb* v. *Booth*, 80 S. C. 501, 61 S. E. 942; *Sollee* v. *Croft*, 7 Rich. Eq. (S. C.) 34; *East Rome* v. *Cothran*, 81 Ga. 359, 8 S. E. 737.

7. It is a general rule of testamentary construction, universally recognized in this country and in England, that, "in the absence of clear and unambiguous language indicating a contrary intent to be derived from the will," considered in the light of all of its provisions, the class of persons described as testator's "heirs," "right heirs," "heirs at law," "relations," or by equivalent phraseology, is to be ascertained as of the time of the death of the testator, and not at some subsequent period; and this rule is based upon the true legal and

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ordinary meaning of the terms employed, and it finds application alike in the cases of vested and contingent and executory interests, and its application is not precluded by the fact that the tenant of an antecedent particular estate is among those, or is the only one, answering the descriptive phraseology at the death of the testator. *Harris* v. *McLaran,* 30 Miss. 533; *Alexander* v. *Richardson,* 106 Miss. 517, 64 So. 217; *Branton* v. *Buckley,* 99 Misc. 116, 54 So. 850, L. R. A. 1917C, 527; *Dunlap* v. *Fant,* 74 Miss. 197, 20 So. 874; *McDaniel* v. *Allen,* 64 Miss. 417, 1 So. 356; *Bullock* v. *Downs,* 9 H. L. Cas. 1; *Lee* v. *Lee,* 1 Drew & S. 85; *Mitchell* v. *Bridges* 13 Week. Rep. 2,000; *Kellett* v. *Shephard,* 139 Ill. 442, 28 N. E. 751, 34 N. E. 254; *Tuttle* v. *Woolworth,* 62 N. J. Eq. 532, 50 Atl. 445; *Kenyon's Appeal,* 17 R. I. 149, 20 Atl. 294; *Pilkington* v. *Spratt,* 5 Barn. & Ad. 731; *Stewart's Appeal,* 147 Pa. 383, 23 Atl. 599; *Stokes* v. *Van Wyck,* 83 Va. 724, 3 S. E. 387; *Boydel* v. *Golightly,* 14 Sim. 327; *Rawlinson* v. *Wass,* 9 Hare, 673; *Gorbel* v. *Davison* 18 Beav. 556; *Thompson* v. *Smith,* 27 Can. S. C. 254; *Wright* v. *Gooden,* 6 Houst. (Del.) 397; *Smith* v. *Winsor,* 239 Ill. 567, 88 N. E. 482; *Bunting* v. *Speek,* 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690; *Weil* v. *King,* 104 S. W. 380, 31 Ky. Law Rep. 1010; *Brown* v. *Lawrence,* 3 Cush. (Mass.) 390; *Abbott* v. *Bradstreet,* 3 Allen (Mass.) 587; *Dove* v. *Torr,* 128 Mass. 38; *Keniston* v. *Mayhew,* 169 Mass. 166, 47 N. E. 612; *Holloway* v. *Holloway,* 5 Ves. Jr. 399, contingent; *Pope* v. *Whitcombe,* 3 Meriv. 689; *Losburg* v. *Newport,* 9 Beav. 376; *Urquhart* v. *Urquhart,* 13 Sim. 613; *Wrightson* v. *McCauley,* 14 Mees. & W. 214; *Nicholson* v. *Wilson,* 14 Sim. 549; *Ware* v. *Rowland,* 2 Phill. Ch. 635; *Baker* v. *Gibson,* 12 Beav. 101; *Bird* v. *Luckie,* 8 Hare, 301; *Re Barber,* 1 Smale & G. 118; *Markham* v. *Ivatt,* 20 Beav. 579; *Starr* v. *Newberry,* 23 Beav. 436; *In re Land,* 9 Week, Rep. 589; *Mortimore* v. *Mortimore,* 26 Week. Rep. 134; *Gast* v. *McNutt,* 40 N. S. 41; *Harrison* v. *Jones,* 82

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Ga. 599, 9 S. E. 527; *Minot* v. *Tappan,* 122 Mass, 535; *Whall* v. *Converse,* 146 Mass. 345, 15 N. E. 660; *Rotch* v. *Rotch,* 173 Mass. 125, 53 N. E. 268; *Crisp* v. *Crisp,* 61 Md. 149; *Boston, etc., Co.* v. *Parker,* 197 Mass. 70, 83 N. E. 307; *Allison* v. *Allison,* 101 Va. 573, 44 S. E. 904, 63 L. R. A. 920; *Wadsworth* v. *Murray,* 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265; *Riehle Appeal,* 54 Pa. 97; *Wilinson* v. *Garrett,* 2 Colly, Ch. Cas. 643; *Siefferth* v. *Bodham,* 9 Beav. 370; *Murphy* v. *Donegan,* 3 Jones & L. 354; *Halloway* v. *Radcliffe,* 23 Beav. 163; *Southgate* v. *Clinch,* 27 L. J. Ch. 651; *Harrison* v. *Harrison,* 28 Beav. 21; *Fletcher* v. *Fletcher,* 3 De Gex, F. & J. 775; *Clifton* v. *Holton,* 27 Ga. 321.

Barnett & Perrin, Barbour & Henry, and *Green & Green,* for appellees.

1. Trustees only proper or necessary parties.—The trustees took a title in fee to Rialto and Springwood plantations by this will. Where lands are devised, the devisees only and not the heirs, are necessary parties to a proceeding. *Williams* v. *Williams,* 49 Ala. 439; *Penn. Life Ins. Co.* v. *Bauerle,* 143 Ill. 459, 33 N. E. 166; *Temple* v. *Scott,* 143 Ill. 290, 32 N. E. 366; *Hale* v. *Hale,* 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Baylor* v. *Dejarnette,* 13 Grat. (Va.) 165-171; *Young* v. *Young,* 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Markle's Estate,* 17 Pa. Co. Ct. R. 337; *Putman* v. *Gleason,* 99 Mass. 454; *Fitzgibbon* v. *Barry,* 78 Va. 762; *Mitford's Pleadings,* 265, 266; *Rhodes* v. *Caswell,* 41 App. Div. 229, 58 N. Y. Supp. 470; *New Jersey Franklinite Co.* v. *Ames,* 12 N. J. Eq. 507, 509; *Willink* v. *Morris Coal Co.,* 4 N. J. Eq. 377; *Van Vechten* v. *Terry,* 2 Johns. Ch. (N. Y.) 197; *Alabama, etc., Ry. Co.* v. *Thomas,* 86 Miss. 27, 38 So. 770; *Wall* v. *Bois Gerard,* 11 Smedes & M. 588; 16 Cyc. 191; *Ridley* v. *Halliday,* 106 Tenn. 614, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. Rep. 902; *Burwell* v. *Cawood,* 2

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How. 560, 11 L. Ed. 384; *Richter* v. *Jerome,* 123 U. S. 233, 8 Sup. Ct. 106, 31 L. Ed. 132; 12 Enc. Pl. & Pr. 1041; *Alabama* v. *Burr,* 115 U. S. 426, 6 Sup. Ct. 81, 29 L. Ed. 435; *Ferris* v. *Van Ingen,* 110 Ga. 108, 35 S. E. 350; *Steiner* v. *Steiner,* 120 Ala. 144, 26 So. 498; *Roberts* v. *Hale,* 124 Iowa, 300, 99 N. W. 1076, 1 Ann. Cas. 940; *Hagan* v. *Barksdale,* 44 Miss. 186; *Hardee* v. *Cheatham,* 52 Miss. 38; section 2079, Miss. Code 1906; *Paine* v. *Pendleton,* 32 Miss. 320; 1 Freeman on Judgments (4 Ed.), section 172.

2. Words "My Right Heirs" Remaindermen.—In construing wills, there are well-established exceptions to the rule that the word "heirs" is to be taken to mean those who would take as heirs as of the time of the testator's death. *Welch* v. *Blanchard,* 208 Mass. 523, 94 N. E. 811, 33 L. R. A. (N. S.) 1 and notes; *Wood* v. *Bullard,* 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; section 2776, Miss. Code 1906; section 2775, Miss. Code 1906; *Middlesex Banking Co.* v. *Field,* 84 Miss. 646, 37 So. 139; section 2779, Miss. Code 1906.

3. The Testator's Intent Controls.—In the absence of statute, the rule is: "It is not a rule of substantive law, but a rule of interpretation, which has been adopted by the courts as one means of ascertaining the intention of the testator as expressed in his will, and it never should be used to defeat what, from the whole will, appears with reasonable certainty to have been his intention." Note 33 L. R. A. (N. S.) p. 5; *Wood* v. *Bullard,* 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; *Bailey* v. *Bailey,* 25 Mich. 185; *Welch* v. *Blanchard,* 208 Mass. 523, 94 N. E. 811, 33 L. R. A. (N. S.) 1; *Smith* v. *Winsor,* 239 Ill. 567, 575, 88 N. E. 482; *Johnson* v. *Askey,* 190 Ill. 58, 60 N. E. 76; *Hardy* v. *Gage,* 66 N. H. 552, 22 Atl. 557; *Welch* v. *Brimmer,* 169 Mass. 204, 47 N. E. 699; *Heard* v. *Read,* 169 Mass. 216, 47 N. E. 778; *Tuttle* v. *Woolworth,* 62 N. J. Eq. 532, 50 Atl. 445; *Middlesex Banking Co.* v. *Field,* 84 Miss. 646, 37 So. 139; *Dunlap* v.

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Fant, 74 Miss. 197, 20 So. 874; *Minter* v. *Wraith,* 63 Simon, Excheq. 62, p. 12; *In re Southworth,* 52 Misc. Rep. 86, 102 N. Y. Supp. 447; *Sims* v. *Comger,* 39 Miss. 232, 77 Am. Dec. 671; *Clampton* v. *Bulmer,* 5 Myl. & C. 108; 2 Beach on Trusts and Trustees, section 472.

4. The Trustees Took a Fee.—They are trustees of an active trust, and also to support contingent remainders. Trustees, in the absence of apt words defining their estate take whatever estate is necessary to execute the trust, even though a life estate or less be expressed, 28 Am. & Eng. Enc. L. (2 Ed.), 923; *Coulter* v. *Robertson,* 24 Miss. 279, 388, 57 Am. Dec. 168. Trustees take a fee where there is a duty to collect rents, profits, or income, and to pay same over to persons entitled, especially where it is to be free from the debts of the beneficiary, or where trustees are vested with discretion as to time, manner and amount of payments (28 Am. & Eng. Enc. L. (2 Ed.), 926, *De Haven* v. *Sherman,* 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745, and especially in spendthrift trusts (28 Am. & Eng. Enc. L. [2 Ed.], 927; 26 Am. & Eng. Enc. L. [2 Ed.], 143). If the trustee is permitted, as here, to sell and reinvest and convert realty into personalty, or to lease the trust property, he takes a legal title in fee. 28 Am. & Eng. Enc. L. (2 Ed.), 927; *Olcott* v. *Tope,* 115 Ill. App. 121, 129, 130; 28 Am. & Eng. Enc. L. (2 Ed.), 929, note, 930; 2 Jarman on Wills, 305, 306, and cases; *Mitchell* v. *Choctaw Bank,* 107 Miss. 314, 65 So. 278; *Jourolmon* v. *Massengill,* 86 Tenn. 82, 5 S. W. 719; *Hale* v. *Hale,* 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Bofil* v. *Fisher,* 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627; *Temple* v. *Scott,* 143 Ill. 290, 32 N. E. 366; *News* v. *Bass,* 92 Va. 383, 23 S. E. 747; *Parker* v. *Carpenter,* 77 N. H. 453, 92 Atl. 955; *Bennett* v. *Bennett,* 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470; *Minnich's Estate,* 206 Pa. 405, 55 Atl. 1067; 2 Minor's Institutes, 395; 2 Washb. Real Prop. (3 Ed.), 535, 534; Fearne on Rem. 225, 229, 230.

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5. Interest of John F. Powell and Wife.—Neither John F. Powell nor his wife have any estate in any of the property, real or personal, devised, and bequeathed to the trustees. The legal title to the whole property, real and personal, was devised to these trustees. *Mitchell* v. *Choctaw Bank,* 107 Miss. 314, 65 So. 278; *Garland* v. *Garland,* 87 Va. 758, 13 S. E. 478, 13 L. R. A. 212, 24 Am. St. Rep. 682; 26 Am. & Eng. Enc. L. (2 Ed.), 143 *et seq.; Leigh* v. *Harrison,* 69 Miss. 923, 11 So. 604, 18 L. R. A. 49; *Jourolmon* v. *Massengill,* 86 Tenn. 82, 5. S. W. 719; *Hale* v. *Hale,* 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Temple* v. *Scott,* 143 Ill. 290, 32 N. E. 366; *Parker* v. *Carpenter,* 77 N. H. 453, 92 Atl. 955; *Bennett* v. *Bennett,* 217 Ill. 434, 443, 75 N. E. 339, 4 L. R. A. (N. S.) 470; *Minnich's Estate,* 206 Pa. 405, 55 Atl. 1067.

6. Annuity Not Interest in Land.—An annuity in its strict sense is a yearly payment of a certain sum of money, granted to another in fee, or for life, or for years, and chargeable only in the person of the grantor. 2 Cyc. 459, note (*City of De Haven* v. *Sherman,* 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; *Wagstaff* v. *Lowerre,* 23 Barb. [N. Y.] 209; *Horton* v. *Cook,* 10 Watts [Pa.] 124. 36 Am. Dec. 151); Id., note (*Robinson* v. *Townshend,* 3 Gill & J. [Md.] 413); 2 Cyc. 460; *Bowen* v. *Payton,* 14 R. I. 257; *Myers* v. *Cullum,* 152 Ind. 700, 51 N. E. 918; *Henry* v. *Henderson,* 103 Miss. 73, 60 So. 33; Perry on Trusts (6 Ed.), 386 (A), notes.

7. John F. Powell Not "Right Heir" Under the Will. —*Middlesex Banking Co.* v. *Field,* 84 Miss. 663, 37 So. 139; *Bailey* v. *Bailey,* 25 Mich. 185; *Smith* v. *Winsor,* 239 Ill. 567, 575, 88 N. E. 482; *Johnson* v. *Askey,* 190 Ill. 58, 60 N. E. 76; *Hardy* v. *Gage,* 66 N. H. 552, 22 Atl. 557; *Welch* v. *Brimmer,* 169 Mass. 204, 47 N. E. 699; *Heard* v. *Read,* 169 Mass. 216, 47 N. E. 778; Note to 33 L. R. A. (N. S.) page 9.

8. *Status* of Contingent Remaindermen.—Representation.—The contingent remaindermen, children, descend-

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ants, or, in the event there are none surviving at the death of John F. and Virginia, then the "right heirs" of the testator, cannot be ascertained until the death of such survivor. The contingent remaindermen take no interest, but a mere possibility, not even a possibility coupled with an interest. *Baylor* v. *Dejarnette,* 13 Grat. (Va.) 165; Williams, Real Property, 232, 233; 2 Cruise's Dig. 333; *Young* v. *Young,* 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Markles Estate,* 17 Pa. Co. Ct. R. 337; *Putnam* v. *Gleason,* 99 Mass. 454; *News* v. *Bass,* 92 Va. 383, 23 S. E. 747; *Fitzgibbon* v. *Barry,* 78 Va. 755, 762; Parties, Mitford Pl. p. 24; *Burwell* v. *Cawood,* 2 How. 575, 11 L. Ed. 384; Mitford, Pl. 265, 266; *Bailey* v. *Hoppin,* 12 R. I. 560; *Hale* v. *Hale,* 146 Ill. 260, 33 N. E. 858, 20 L. R. A. 247; *Jourolmon* v. *Massengill,* 86 Tenn. 81, 5 S. W. 719; *Temple* v. *Scott,* 143 Ill. 290, 32 N. E. 366; *Mitchell* v. *Choctaw Bank,* 107 Miss. 314, 65 So. 278; *Rembert* v. *Key,* 58 Miss. 534; *McCarroll* v. *Alexander,* 48 Miss. 136.

STEVENS, J., delivered the opinion of the court.

Appellants exhibited their bill in equity against the appellees. There was a demurrer to the bill, the demurrer was sustained, and from the decree sustaining the demurrer and dismissing the original and amended bill, appellants prosecute this appeal. H. H. Brickell, J. B. Ellis, and J. J. North are successors in office of the trustees originally appointed under the will of J. F. Powell, deceased, and the other appellants are the children and next of kin of J. F. Powell, deceased, a former citizen of Yazoo City. The will of J. F. Powell is as follows:

"In the name of God, Amen: I, J. F. Powell, of Yazoo City, Mississippi, realizing the uncertainty of life and the certainty of death, and being of sound and disposing mind and memory, do hereby make and declare this to be my last will and testament, revoking all other wills and testaments heretofore made by me.

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"Item No. 1. I hereby will and direct that my executor, hereinafterwards named, shall, as soon as possible, collect in all monies owing to me and out of fund and any other monies coming into his hands, pay my just debts.

"Item No. 2. I hereby will and bequeath to the persons named in this item legacies as follows: To my sister, Mrs. E. R. Anderson of Yazoo City, Miss., the sum of two thousand dollars, to my sister, Mrs. G. A. Petit the sum of two thousand five hundred dollars, to Mrs. Jennie Lockhart the sum of one thousand dollars, to W. K. Kennard the sum of ($1,000.00) one thousand dollars; to R. R. Crook the sum of one thousand dollars; to Joe Holberg the sum of one thousand dollars; to W. B. Sallis the sum of five hundred dollars; to Bre Butler the sum of one thousand dollars; to J. J. Muse the sum of five hundred dollars; to Nye Crook, the daughter of R. W. Crook, the sum of one thousand dollars; to Mrs. R. W. Crook, the wife of R. W. Crook, the sum of one thousand dollars; to Allen B. Kling the sum of one thousand dollars; to W. S. Goosey, the sum of one thousand dollars, to Mrs. Elizabeth Powell, the wife of my deceased brother John Powell, the sum of five hundred dollars ($500.00); and to my servant, Rachael Hendricks, the sum of seven hundred fifty dollars.

"Item No. 3. I hereby will and bequeath and devise to my niece, Miss Mollie Powell, the daughter of my deceased brother, John Powell, that certain plantation situated in Yazoo county, Miss., and known as 'Pleasant Green.'

"Item No. 4. All the rest and residue of my property, both real and personal, I will, bequeath and devise, in trust, to Thomas H. Campbell, Sr., trustee for the purpose hereinafterwards specified, and with the limitations and exceptions hereinafterwards mentioned, to have and hold in trust for the use of my son, John F. Powell, and his wife, Virginia Powell, for and during their natural lives, and in the event of the death of either, for the use and benefit of the survivor for and during his or her natural

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life, and upon the death of the survivor the trust herein mentioned shall terminate, and the property herein devised to said trustee, shall vest in the children of John F. Powell, or the descendants of such children, and in the event of the death of said John F. Powell, without children, then upon the death of Virginia Powell, the wife of John F. Powell, the property devised in trust, as aforesaid, shall vest in my right heirs forever.

"I further direct that out of the rents, issues, profits and income of said property that said trustee, or his successor, shall pay John F. Powell, and his wife, Virginia Powell, during their natural lives, jointly, the sum of two thousand dollars per annum, said sum to be paid in monthly installments, and upon the death of either John F. Powell, or his wife said sum shall be paid to the survivor for and during his or her natural life; and the rest and residue of said rents, issue, profits, and income, after the payment of all expenses necessary for the proper improvement, management and maintenance of said property shall become a part of the corpus of my estate, and said trustee shall invest the same or any other idle monies that he may have in his control, by lending out the same and taking as security therefor first mortgage on real estate or other undoubted security, at the highest rate of interest obtainable which is consistent or with safety and security.

"I further direct that the said trustee or his successor in office may with the consent of the chancellor of the Yazoo county chancery court, sell and dispose of the property bequeathed and devised to said trustee, and in case of sale shall invest the proceeds as aforesaid, but it shall not be incumbent on the purchaser to see to the application of the proceeds.

"The real estate herein devised to said trustee is upon the following conditions and limitations and exceptions, that I hereby devise the house and lot in Yazoo City, Miss., now occupied by me as a residence, to my son, John F. Powell, directly, absolutely and in fee simple, and I further direct that the said John F. Powell, and wife Virginia

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Powell may select as their home to be resided upon by them any of the plantations comprised in the real estate devised herein, and shall have the same free of all rent while so occupied by them, but the title to such plantation if so selected shall not be divested out of said trustee.

"The income herein provided for the benefit of John F. Powell and his wife Virginia Powell shall not be anticipated by them or either of them, nor shall the property devised to said trustee be in any way liable for any debts incurred by said John F. Powell and Virginia Powell or either of them.

"I further direct that, if, from ill health or other unforeseen cause, in the opinion of the said trustee, it should become expedient and proper, for the comfort and convenience of said John F. Powell and Virginia Powell, or either of them, that the income herein provided for their benefit should be increased, the said trustee shall have power to do so.

"Item No. 5. I hereby nominate and appoint R. W. Crook executor of this my last will and testament, and direct that he shall wind up my estate as speedily and economically as possible, consistent with good management. If I am engaged in the mercantile business at my death, for the purpose of collecting debts due me and to prevent a sacrifice of the goods, wares, and merchandise, my executor may continue said business for a time not exceeding one year.

"I further direct my executor to erect a suitable and proper monument over the grave of my wife, provided I have not done so prior to my death. And I further direct my executor to erect a similar monument over my grave.

"I further direct that my executor shall not pay the legacies herein bequeathed until one year after my death and in his discretion he may pay only one-half at the end of the first year and the balance within two years from my death.

"On page 1, line 23, the name of 'Mrs. S. A. Pettit' is corrected to read 'Mrs. G. A. Pettit.'' On page 2 line 4

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the word 'son' is hereby corrected so as to read 'daughter.' On page 2 at line 32 the words 'and exceptions' were interlined and the word 'after' marked out. All of these corrections and interlineations being made before the signing of this will.

"Witness my hand this 6th day of Oct., 1908.

"J. F. POWELL.

"Attest: B. J. BARRIER,

"Attest: GEO. H. QUEKEMEYER.

"The above-named J. F. Powell, being of sound and disposing mind and memory, declared the above to be his will and testament and signed and published the same as such in our presence, and we at his request, signed our names hereto as subscribing witnesses, in his presence and in the presence of each other.

"This 6th day of Oct., 1908.

"B. J. BARRIER.

"GEO. H. QUEKEMEYER.

"This codicil to my foregoing will and testament made, published and declared this 19th day of August, 1909. In addition to T. H. Campbell, Sr., named in item 4 of my said will, I hereby appoint R. W. Crook, and the Bank of Yazoo City as trustees to act jointly with said T. H. Campbell, Sr., and all powers vested in said Campbell as trustee are hereby vested in said T. H. Campbell, Sr., R. W. Crook, and the Bank of Yazoo City. In the event of the death of either the said Campbell or Crook, they shall have the power to appoint by will their successor. I direct that the trustees herein named and the executor named in my will be not required to give bond as such.

"I will and bequeath and devise, in addition to the legacies heretofore given to R. W. Crook, and the said Lillian W. Crook, to the said R. W. Crook and the said Lillian W. Crook, my plantation in Yazoo county known as Gandercleugh and all the live stock on the same at the time of my death. To my niece Bessie Atkinson I will and bequeath the sum of five hundred dollars to be paid as the

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other legacies mentioned in my will dated the 6th day of October, 1908.

"Witness my hand this 19th day of August, 1909.

J. F. POWELL.

"Attest: E. S. CRANE,

"GEO. H. QUEKEMEYER.

"T. M. LIGHTCAP."

In the course of executing the will, the executor exhibited a petition to the chancery court under sections 2075 and 2079 of the Code of 1906 for the sale of certain valuable real estate to pay the debts of J. F. Powell, deceased. This petition was filed upon the theory that it was preferable and to the best interests of all parties that the real estate be sold in preference to the personalty. This petition was exhibited by the executor named in the will and the trustees, T. H. Campbell, R. W. Crook, and Bank of Yazoo City, answered the petition, and by their answer admitted that the prayer of the petition should be granted. The answer says:

"They believe it is to the best interest of the said estate that the petition should be granted and the real estate should be sold to pay the debts."

The chancellor thereupon decreed:

That R. W. Crook, the executor, is authorized and directed to sell any real estate belonging to the estate "for the purpose of paying the debts of said J. F. Powell, deceased, and he is authorized to sell only so much of said land as is required to pay the debts of said J. F. Powell, deceased; that is, to an amount not exceeding ninety-five thousand dollars, as set forth in the petition as the amount of unpaid debts now owing by the estate of J. F. Powell."

It appears that J. F. Powell was the owner of a number of plantations, a mercantile business in Yazoo City, a large amount of shares of stock in corporations, and other personalty. The executor in presenting his petition praying that the real estate be sold had citation served upon the trustees of the will, but upon no other persons.

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A bond was executed for the proper application of the proceeds, and at the sale made by the executor appellee H. B. Lightcap purchased the Rialto plantation and the Springwood plantation, and fully complied with the terms of his bid by the payment of the purchase money and the sales made to him were duly confirmed by the court. Thereafter the original trustees resigned, and so also did R. W. Crook resign as executor. Appellees Brickell, Ellis, and North were then appointed trustees, and Mr. Brickell was appointed administrator with the will annexed. The substituted trustees then joined John F. and Virigina Powell and other kin of J. F. Powell, deceased, in this bill of complaint asking that the deeds of the executor attempting to convey the lands to appellee Lightcap be canceled as a cloud upon the complainants' title; that the possession be restored to the trustees in order that the trust might be continued and the estate conserved for the contingent remaindermen. The alleged vulnerable point of attack relied upon by counsel for appellants is the charge that the sale to Lithcap is void because all necessary and proper parties were not before the court. In this proceeding we are called upon to construe section 2079 of the Code. This section is as follows:

"Heirs or Devisees to be Summoned.—When a petition shall be filed to sell or lease land to pay debts or otherwise affecting the real estate of a deceased person, all parties interested shall be cited by summons or publication, which shall specify the time and place of hearing the petition; and if the petition be filed by a creditor or by a purchaser to correct a mistake in the description of the land, the executor or administrator shall be cited."

With this brief statement of the case we shall proceed to announce the conclusions we reach.

The sale to Lightcap cannot be successfully attacked in this proceeding unless the decree authorizing the sale is absolutely void. If the court had jurisdiction of the subject-matter and of the parties, then confessedly the decree is good. There is no serious contention that the

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chancery court did not have jurisdiction of the subject-matter. Section 2075 expressly authorizes a sale of land in preference to personalty when the court is "satisfied that it would be to the interest of the distributees or legatees." This statute applies no matter whether the property is devised by will or descends by operation of law. It may be conceded that large powers and delicate discretion are here vested in the chancery court. But so the statute is plainly written. This contest was not initiated by a legatee or devisee to recover property especially set apart by the will for such a contestant. The sale here was of a part of the *corpus* of the estate, and there can be no question about the power of the chancery court to decree the sale if all necessary parties were before the court. This brings us to the real battle ground of this case. Did the court have jurisdiction of the parties?

The answer to this question requires a construction of section 2079 of the Code. The title of this statute declares, "Heirs or Devisees to be Summoned." In the body of the statute it is declared, "All parties interested shall be cited by summons or publication." The statute, in our judgment, here speaks of and embraces those who have a vested interest in the land itself—the heirs and devisees or the assignees of either. Although the personal estate of a decedent goes to the executor or administrator primarily charged with the debts of the decedent, yet in Mississippi, by section 2056 of our Code:

"The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed."

By this statute the real estate stands charged with the debts in any case where there is an insufficiency of personalty or no personalty whatever. Section 2075 goes a step further, and provides, as stated, for a sale of the real estate in certain instances in preference to a sale of the personalty. Under any petition to sell,

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the heirs or devisees—those who own the estate sought to be sold—must be made parties. This is the plain and simple meaning of the statute, and this is the meaning which our court has uniformly given the statute in question. In the early case of *Campbell* v. *Brown,* 6 How. 106, our court, by Mr. Justice TROTTER, said:

"One case is given by the statute in which he [administrator] may sell the real estate, and that is when the personal property is insufficient to discharge the debts of the deceased. Another is perhaps where it can be shown that it will be for the interest of the heirs to convert it into money. But in any proceeding, in the one case or the other, the heirs must have notice. This is required by the statute as well as by general principles of justice."

In that case the decree of the probate court was attacked because of the lack of notice to the heirs of the proceedings there had to sell the real estate. The language of the statute which appears in Hutchinson's Code on pages 666 to 667 provides that:

Citation should issue to "all persons interested in the lands, tenements, and hereditaments of the deceased."

And at another point:

"The heir or devisee whose lands, tenements, or hereditaments, so descending or devised, shall be sold as aforesaid for the payment of the debts of the intestate or testator, may compel all others claiming or holding under such intestate or testator, to contribute in proportion to their respective interests, so as to equalize the burden or loss."

The provision last quoted has been brought forward and is now a part of section 2069 of the Code, providing that:

"The heir or devisee whose lands shall be sold may compel" contribution.

Again, in the case of *Puckett et al.* v. *McDonald et al.,* 6 How. 273, is presented an attack similar to the present controversy, and the court held that:

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They "had no jurisdiction of the persons interested in the subject of the decree, because no notice, either actual or constructive, was ever given them."

Mr. Howard, the official reporter, wrote to this case the following syllabus:

"A sale of the lands belonging to the estate of a person deceased, under an order of the probate court, which does not show notice to the *heirs* of the estate, is void."

We have here for emphasis underscored the word "heirs." In the latter case of *Laughman* v. *Thompson,* 6 Smedes & M. 259, the court, on page 269, again used the words "heirs at law," saying:

"It must appear from the records of the probate court, in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law."

The case of *Martin* v. *Williams,* 42 Miss. 210, 97 Am. Dec. 456, shows another attack made upon a decree ordering the sale of lands. In this case there was a will, and the court, by SHACKELFORD, C. J., said:

"The only citation in this case is copied into the record. On the 15th of November, 1858, as we have seen, this citation was returned by the sheriff 'executed.' All the devisees in the will were embraced in this citation. It is obvious that this return of the sheriff is untrue in point of fact. It was impossible for him to have executed that process upon the residents of Lowndes and Octibbeha counties and the resident of the state of Alabama. It necessarily follows that parties in interest were not served with process, and their interests are or were not affected by the decree."

In *Paine* v. *Pendleton,* 32 Miss. 320, there was a petition to sell lands because of an insufficiency of personalty. Not only the heirs were made parties in that case, but the purchaser from the intestate in his lifetime and the purchaser of a part of the land from the heirs of the intestate since the latter's death were all made de-

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fendants. There was a contention that all the defendants should not have been admitted to contest the petition. The court said:

"The object of the proceeding was to sell the lands for the payment of debts of the intestate. Not only the heirs, but all other persons interested in the lands, were required to be notified of the application and warned to appear, and show cause against it."

The distinguished reporter, then officially serving the court, construed this language as meaning "all persons interested in the lands of the decedent, and who prima facie have title thereto, have a right to appear and contest the application." Again, in *Hargrove* v. *Baskin,* 50 Miss. 194, the court said:

"The heir or devisee must be made a party"—citing *Paine* v. *Pendleton, supra,* and *Ferguson* v. *Scott,* 49 Miss. 500.

The phrases "parties interested" and "parties in interest" appear several times in the chapter on "Executors and Administrators." Section 2059 uses the phrase "parties in interest" in requiring citation when personal property is sought to be sold for the benefit of the estate, and not for the purpose of paying debts. The statutes authorizing the leasing of land for a term of years direct that "parties interested shall be summoned." In all these statutes can it be said that the holders of contingent interests should be made parties? Creditors are indirectly interested. Is not the primary purpose of the statutes to require simply that owners of the estate sought to be sold should be brought before the court? We think so.

This brings us, then, to a consideration of the will of John F. Powell and the determination of the character of estate taken by John and Virginia Powell, and the other collateral kin here suing. In construing the will we look to the general scope and purpose and the entire language employed. In the instant case there are good

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reasons which led the testator to devise his estate to trustees with directions that the only son, John, and Virginia, the wife of John, should receive an annuity. By the express terms of the will itself the trustees are fully empowered to manage the entire estate with the exception of certain specific devises, and by and with the consent of the chancellor the trustees are empowered to sell and dispose of the property bequeathed and devised. It is provided that the income provided for John F. and Virginia Powell should not be anticipated by them, "nor shall the property devised to said trustees be in any way liable for any debts incurred by" them or either of them. By the terms of this will John F. and Virginia Powell took no estate in the property itself, but are interested solely in the monthly installments which the trustees are to pay to them "out of the rents, issues, profits, and income." It will be noted that the full beneficial use of the property is not given to John F. and Virginia Powell. As to the bulk of the estate they are not given even the right of possession. They have neither possession nor title and have no voice in the management of the estate. It follows that the doctrine of virtual representation applies. The trustees are charged with an active trust. They are to make all contracts, collect all rents and profits, make all investments, prosecute and defend all suits in reference to the estate. The will does devise the home place in Yazoo City to John F. Powell "absolutely and in fee simple." The testator employed this language advisedly. It negatives any idea that John F. Powell took any estate whatever in any other portion of the real estate. The active trust continues for the life of John F. and Virginia Powell or the survivor of them, but "upon the death of the survivor the trust herein mentioned shall terminate, and the property herein devised to said trustee shall vest in the children, and in the event of the death of said John F. Powell without children, then upon the

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death of Virginia Powell, the wife of John F. Powell, the property devised in trust, as aforesaid, shall vest in my right heirs forever." At this time John F. Powell still lives, and is without children, and it cannot be known whether he will die without children or descendants of children. There are then no persons *in esse* with the vested interest in the remainder. The event which will terminate the trust has not yet occurred, and it cannot possibly now be known who will receive the remainder. If, then, the collateral kin, who are here suing, have any interest whatever, the interest is contingent, and not vested. They may never have any interest in this estate. They had no vested interest at the time the plantations were sold to Mr. Lightcap. But it is very earnestly argued that John F. and Virginia Powell should have been made parties. As before stated, John F. and Virginia Powell were represented by their trustees. It is stated in Mitford's Pleadings, 265, 266:

"Trustees of real estate for the payment of debts or legacies may sustain a suit either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which, in many cases, would be impossible, and the rights of the creditors or legatees will be bound by the decision of the court against trustees."

Under the language of the will here under review it cannot be doubted that the trustees are fully empowered to prosecute necessary suits for the recovery of debts due the estate and to protect their title and possession. They have the equal right to defend litigation. The cases are frequent where trustees in a bond mortgage are held to represent fully the interest of the bondholders and where the trustees are held to be the only necessary parties. A case of this kind appears in our court. *A. & V. R. R. Co.* v. *Thomas,* 86 Miss. 27, 38 So. 770. In the early case of *Wall* v. *Boisgerard,* 11 Smedes &

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M. 588, there was a suit against the directors, and the court held that all the partners could probably never be reached, and that the directors "were the agents for all of the partners, and it is sufficient that they are parties." But the will in this case goes further in granting power to the trustees. They not only have the right to prosecute and defend litigation, but with the consent of the chancellor they are empowered to sell real estate. This in effect is what the trustees in this case have done. At the time the petition to sell the realty was presented to the court the estate owned valuable stocks as well as valuable plantations. The executor appears to have been one of the trustees, and conceived the idea that it was best for all beneficiaries of this estate that the valuable stocks should be preserved and the real estate sold. All of the trustees were of the same opinion. When, therefore, the executor presented his petition asking that the land be sold, the trustees did more than merely answer the petition. They came in and asked the court to grant the prayer thereof. The decree of the court shows upon its face that the trustees joined in the request. The chancellor in hearing the matter approved the plan agreed upon by the executor and trustees. The chancellor then gave his consent to a sale of the real estate. The effect of this was an exercise of the power conferred by the will authorizing the trustees to sell any portion of the estate by and with the consent of the chancellor. In conferring this power the testator expressly provides that "it shall not be incumbent on the purchaser to see to the application of the proceeds." It was then not incumbent upon Mr. Lightcap in this case to see that the purchase money was properly applied. The executor was under a bond for the money and the faithful application thereof. By a sale of the realty in preference to personalty no part of the estate was destroyed. Both realty and personalty were devised in trust, and the accumulations of the estate are under the terms of the will to be vested and reinvested, and

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the whole estate conserved in the best way possible. By a sale of the realty the valuable personalty was preserved to the estate, and this personalty must be presumed to have been of equal value of the real estate sold to Mr. Lightcap. Surely in exercising the power conferred upon the trustees to sell any portion of the estate by and with the consent of the chancellor, John F. and Virginia Powell would not have to be consulted. Whatever the reasons which impelled the testator may have been, it is manifest that the personal judgment, advice, or discretion of John F. and Virginia Powell count for nothing in the administration of this estate. They, then, were not necessary parties to the proceeding for a sale of the lands. There is a distinction universally recognized between necessary and proper parties. We need not go to the extent of holding that the chancery court would not entertain a petition by John F. and Virginia Powell looking towards a preservation of the estate in accordance with the general purposes of the will or to say that the chancellor would turn a deaf ear to any suggestions made by them. We are here dealing with the question as to who are necessary parties, and surely by this criterion the decree of sale must be upheld.

The plan and purpose of this will is to provide merely an annuity for John F. and Virginia Powell, and at the death of the survivor of them to cast the entire estate upon their children or the descendants of their children, if any there be, and, if there are no children or descendants of children, then to the "right heirs" of John F. Powell, deceased. The contingency here provided for has not arrived, and it will profit the court little here to speculate upon who will take the estate when the "survivor" departs this earth. It appears that John and his wife are yet childless. Probably, then, the estate will devolve upon those embraced in the description "my right heirs." Of course, the intention of the testator must control. The contingency which will devolve

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the title upon "my right heirs" has not yet happened, and before this contingency does happen, no one has a right to claim the estate by virtue of this designation "my right heirs." The interests of whomsoever may claim under this phrase are contingent, and not vested. In this proceeding we are not called upon to indicate who will ultimately take the estate under the designation mentioned. It is sufficient to say that John F. Powell, the son, took no vested estate. The purpose of the testator to dispose of his entire estate is perfectly manifest. We should not, by any amount of refined construction, produce in this case a partial intestacy. It appears that the testator was a man of large business experience and possessed a valuable estate, and it was his intention to make disposition of the whole. During the life of John the title is cast upon the trustees. While John lives he has no title. When he is dead he will need none. Here we might say it is unnecessary for us to characterize the exact estate or title taken by the trustees; that is to say, whether they have taken a fee simple or a life estate with a power of sale. The title which they do take will certainly terminate upon the death of the "survivor," whether that be John or his wife, Virginia, and then it is the estate vests fully and completely. Any other construction would lead to the holding that there vested in John an estate which upon his death without issue survivng him would descend to his wife, Virginia. Such manifestly was never the intention of the good father who here so bounteously attempted to take care of his son and daughter-in-law, and yet to accomplish this without devolving upon them any title, legal or equitable. Any other construction would defeat the purpose of the testator and destroy the very will itself. The character of the estate taken by John F. and Virginia Powell in the present case is strikingly similar to the beneficial interest taken by the sons of the testatrix in *Thomas* v. *Thomas,* 97 Miss. 697, 53 So. 630. If, instead of a devise in trust, the es-

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tate had been devised to John F. and Virginia Powell for life with remainder to their children, or in default of children the "right heirs" of the testator, then John and Virginia would have been parties in being having a vested estate, would then have been necessary parties, and on being summoned would have represented the contingent remaindermen in the litigation here brought under review. *Ridley* v. *Halliday,* 106 Tenn. 614, 61 S. W. 1027, 53 L. R. A. 477, 82 Am. St. Rep. 902, holds:

"It has been held by a large majority of the courts, both English and American, that in certain cases the life tenant will represent contingent remaindermen where no one of the latter is *in esse* at the time the court is called upon to intervene with regard to the estate in controversy."

There are many cases holding that in partition suits and other proceedings in court affecting the title or possession of real estate, the life tenant is the only necessary party where the interests in remainder are contingent, and no person is known to be in existence having a fixed and vested interest. Cases on this point both in England and America could be multiplied.

The bill does not show a case of fraud, conspiracy, or collusion. The court had jurisdiction of the subject-matter, and we must indulge the presumption that there were lawfully probated debts to be paid, and that the interests of parties and creditors were properly safeguarded by the chancellor. The intimation that one of the trustees was disqualified to act because it had a probated account is not sufficient to show fraud or any overreaching. In this state it is lawful for the executor or administrator to probate his individual account, and here there were three joint trustees. Courts should presume in favor of good faith until the contrary is shown. Here the bill does not set up facts from which fraud or collusion may be inferred, and, indeed, the oral argument of learned counsel was not based on this ground.

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The proceedings here attacked have been approved by three learned chancellors of the district. Chancellor Lyell ordered the sale; Chancellor Jones rendered the decree of confirmation; and Chancellor Taylor has dismissed the bill in the present attack. The purchaser, Mr. Lightcap, paid his bid, and has entered into possession upon the faith of the decrees rendered, and presumptively the consideration paid by him has been disbursed by the court for lawful purposes. Equity, then, as well as the law, is in his favor.

Affirmed.

ETHRIDGE, J. (dissenting).

In my opinion, the demurrer to the declaration should have been overruled, and the appellees required to answer. In order to make my views clear, it will be necessary to state more at length the allegations of the bill than they have been stated in the majority opinion; for not only is the will to be construed and sections 2075 and 2079 of the Code to be construed as applied to the will in this case, but there are allegations in the pleading that, in my opinion, make it legally impossible to treat the trustees as the virtual representatives of any of the parties in interest in the estate of the decedent. The bill alleges that J. F. Powell at the time of his death was seised and possessed of certain plantations described in the declaration, and that he owned a large landed and personal estate which came into the hands of his executor named in the last will and testament, said personal property consisting of live stock, farming implements, merchandise, stock of corporations, notes and accounts, stock and tangible personal property appraised at ninety-nine thousand two hundred and fifty-seven dollars and seventy-six cents, and that there were probated claims against the estate to the amount of one hundred and sixty-three thousand one hundred and eighty-eight dollars and forty-four cents, and legacies

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to the amount of sixteen thousand two hundred and fifty dollars, and that if the directions of the will had been observed the assets in the hands of the executor were sufficient to pay the debts and legacies; that on the 8th of February, 1912, the executor exhibited a petition to the chancery court of Yazoo county against the trustees praying for a decree ordering a sale of realty in preference to personalty for the purpose of paying debts, the prayer of which petition the trustees by their answers joined, and a decree ordering the sale was granted without notice to or service of process upon the parties interested in said estate other than the trustees. It is alleged that the petition for the sale of lands did not describe particular land or pray for the sale of any particular land, and that the decree of the court granting the prayer of the petition did not describe any particular land to be sold, but authorized the executor to sell any of the lands of which J. F. Powell was possessed at the date of his death, not prescribing the terms or conditions of the sale, except to provide that only sufficient land should be sold to pay the debts, leaving the particular lands to be sold entirely to the discretion of the executor, and that such sale was made and confirmed without notice to any of the complainants or any other party than the trustees in the will. The bill also alleged that it was unnecessary to sell the lands to pay debts, and that the debts so called to which the proceeds of the sale were to be applied were not lawful debts against the estate of the deceased, but were in legal effect personal debts of the executor due to one of the trustees. It is also alleged that there was sufficient moneys and notes from lands previously sold to pay the debts without sale of the land in question in this suit.

It further appears that subsequent to the death of the decedent that John F. Powell and Virginia Powell, his wife, threatened to bring a suit to contest the provisions of the will, and that the trustees and said John F. Powell and Virginia Powell, with the consent of other rela-

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tives of the deceased, entered into an agreement by which John F. and Virginia Powell undertook to surrender their right granted under the will to live upon any one of the plantations free of rent charge in consideration of an agreement on the part of the trustees to increase the annual allowance made under the provisions of the will from two thousand dollars per annum to five thousand dollars per annum, and in addition to surrender to John F. Powell certain stock in corporations set out in detail in the agreement. It further appears in this agreement that the trustees undertook to pay out of the funds in their hands seven hundred dollars attorney's fee to the attorneys of John F. and Virginia Powell in attacking the will and in bringing about a compromise. In this agreement of compromise it is recited that John F. Powell would be the "right heir" of J. F. Powell, deceased, in the event he died without children, and that upon his death without children the *corpus* of the estate would be vested in the petitioner. It is further agreed that the trustees should increase the allowance to five thousand dollars, and this increase should be effective from the date of the death of the testator. By paragraph 5 of the compromise the trustees agreed to deliver contemporaneously with the execution of that agreement to John F. and Virginia Powell all notes and accounts, evidences of indebtedness, moneys, and personal property belonging to said John F. and Virginia Powell. In paragraph 7 it was agreed that, in consideration of the compromise agreement being faithfully carried out, John F. and Virginia Powell waived all right to contest the validity in any court of the said will and codicil, and agreed that the will and codicil probated are valid and binding, "except as modified by the terms of this compromise agreement." In paragraph 10 of the compromise agreement it was provided that in the event any court of competent jurisdiction shall ever decide that the parties of the first part (the trustees) have exceeded their authority under the will

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and codicil in entering into this agreement, the same shall become null and void as to the parties of the second part, and the parties of the second part shall still have, and may enforce in any court, all rights they have and not be prejudiced in any respect by the delay. In article 11 it was agreed that the annuity raised to five thousand dollars should never thereafter be decreased, but nothing therein contained should be construed to be a limitation upon the power of the trustees or their successors to further increase the sum to a greater sum than five thousand dollars, if at any time in the future it should become proper and expedient to do so under the terms of the will.

It is alleged that the sale of these lands was invalid and illegal: First, because the lands were not described in the decree of February 8, 1912, or by the petition upon which it was granted; second, that said decree was rendered without notice to or service of process upon either of the complainants, John F. and Virginia B. Powell; third, the same was rendered without notice to or service of process upon the other persons interested in said estate under said last will and testament; fourth, the decree ordered and the petition on which same was granted prayed for the sale of realty in preference to prsonalty for the purpose of paying debts contrary to the directions of said last will and testament; fifth, that there was no schedule of assets filed with the said petition; sixth, there was no schedule of probated debts owing filed with the said petition; seventh, said petition did not pray for, and said decree did not order, the sale of any specific part of the realty, but left the determination of what part should be sold entirely to the executor; eighth, that the lands were sold subject to leases thereon, and were so advertised contrary to the terms and provisions of the decree, and said leases had been made by the trustees in charge thereof; ninth, that the sale was confirmed without motion or petition therefor or report thereof or consent thereto by the parties be-

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fore the court, all of the said papers being filed subsequent to the decree of confirmation.

The declaration was demurred to, the demurrer containing many grounds, among which the following may be mentioned: First, there is no equity on the face of the bill; second, that the bill did not show cause of action against the defendant; third, that the bill shows that the proceedings to sell the land to pay debts had as defendants thereto the trustees, and that the trustees consented to the sale of the lands in suit; fourth, that the bill does not show any title in complainants; fifth, that the record in the administration proceedings was a part of the record of the court, of which the court will take judicial knowledge, and show that the executor executed his bond for the faithful application of the proceeds of the land; sixth, the bill does not show that the money was not applied to the payment of lawful debts; seventh, that the decree of confirmation of sale is conclusive, and that the sales were "to the interest of the devisees and legatees and cannot be collaterally attacked;" eighth, that the averment of the bill that the indebtedness to the Bank of Yazoo City was one for which the estate was not liable is precluded by the decree ordering the sale and its confirmation. There are various other grounds, among which may be stated without numbering them: That the bill did not show the debts were not incurred by the trustees in conducting the mercantile business or in the proper improvement, management, and maintenance of the plantation, and that there were no persons *in esse* having an interest in the Rialto and Springwood plantations, except the trustees, and they were the only necessary parties defendant to the petition to sell lands in preference to personalty; also the averment that the income is insufficient to pay the annuity by reason of unnecessary and improper sales, that the remedy would be against the executor for misapplication of the funds, and not against the defendant's title to the property, and that

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the decree of sale was conclusive adjudication of the liability of the property for the payment of the debts. I invite the attention of the bar to the terms of the will set out in full in the majority opinion. I desire to refer here to certain features of the will. Item No. 1 directed the executor to collect all moneys as soon as possible, and out of this fund and any other moneys coming into his hands to pay the testator's just debts. Item No. 2 bequeathed to Nye Crook, the daughter of R. W. Crook, the executor, one thousand dollars, and to the wife of the executor one thousand dollars, and other legacies. Item No. 3 bequeathed to Miss Molly Powell, niece of the decedent, Pleasant Green plantation, in Yazoo county, Miss. Item No. 4 provided that "all the rest and residue of my property, both real and personal, I will, bequeath, and devise in trust to Thomas H. Campbell, Sr., trustee, for the purposes hereinafter specified and with the limitations and exceptions hereinafter mentioned, to have and to hold in trust for the use of my son, John F. Powell, and his wife, Virginia Powell, for and during their natural lives, and in the event of the death of either, for the use and benefit of the survivor during his or her natural life," and provides that on the death of the survivor the trust shall terminate, and the property devised shall vest in the children of John F. Powell or the descendants of such children, and in the event of the death of John F. Powell without children, then upon the death of Virginia Powell, wife of John F. Powell, the property "shall vest in my right heirs forever." "I further direct that out of the rents, profits, and income of said property that the said trustee, or his successor, shall pay Jhon F. Powell and his wife, Virginia Powell, during their lives jointly the sum of two thousand dollars per annum, said sum to be paid in monthly installments and upon the death of either John F. Powell or his wife said sum shall be paid to the survivor for and during his or her natural life." The trustee is then directed to invest the residue of the

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profits and income for the proper improvement, management, and maintenance of the property and any idle or surplus money to be invested by lending the same out on the best security and at the best rate of interest obtainable consistent with safety and security. Then follows this provision: "I further direct that the said trustee, or his successor in office, may, with the consent of the chancellor of Yazoo county chancery court, sell and dispose of the property bequeathed and devised to the said trustee and in case of sale shall invest the proceeds as aforesaid, but it shall not be incumbent upon the purchaser to see to the application of the proceeds." Then follows a devise to John F. Powell in fee simple of the lot and house owned and occupied by the decedent as a residence to John F. Powell absolutely in fee simple. "And I further direct that said John F. Powell and his wife, Virginia Powell, may select as their home to be resided upon by them any of the plantations comprised in the real estate devised herein and shall have the same free of all rent while so occupied by them." Then there is a provision as follows: "The income herein provided for the benefit of John F. Powell and his wife, Virginia, shall not be anticipated by them or either of them, nor shall the property devised to the said trustee be in any way liable for any debts incurred by the said John F. Powell and Virginia Powell or either of them. I further direct that if from ill health or other unforeseen cause in the opinion of the trustee it shall become expedient and proper for the comfort and convenience of said John F. Powell and Virginia Powell, or either of them, that the income herein provided for their benefit should be increased, the said trustee shall have power to do so." In the codicil of the will R. W. Crook, the executor, and the Bank of Yazoo City were also made trustees to act jointly with T. H. Campbell, Sr. Then follows the devise to R. W. Crook and Lillian W. Crook "my plantation in Yazoo county known as Gandercleugh and all the live stock on the same at the time of

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my death." It will be seen from the foregoing that the executor and trustee, R. W. Crook, was a devisee of the will, and that he and his daughter and wife were interested in the estate, and it was to his interest personally as well as to the interest of his family to see that the plantation and devises so made were not used or sold in paying debts. It will be seen also that the other trustee, the Bank of Yazoo City, was a large creditor of the estate, or at least under the allegations of the bill of one of the trustees, the executor and cotrustee, and was interested adversely to the appellants in this cause. It is further to be seen from the above recitals that John F. and Virginia Powell not only have an annuity of two thousand dollars, but have a fee-simple interest in the house and lot constituting the homestead of the decedent and the right for life to live upon any of the plantations devised in the will free of rent charge during their life. This at least was a qualified life estate in all plantations, of any of them, owned by the decedent at the time of his death.

Under the decree ordering the sale leaving to the executor the sole power to sell any of the lands owned by the decedent at his death, the executor could, if he so willed, if the said decree of sale was valid, select the plantation of any of the legatees or the residence willed to John F. Powell or any other realty owned by the decedent. It further appears from the recitals of the will that John F. and Virginia Powell were the beneficial owners of the estate not specifically devised during their natural lives. It was to be used, managed, and conserved by the trustees for the use of John F. and Virginia Powell during their lives, and at their death was to terminate and vest absolutely in the right heirs of the decedent in the absence of children born to John F. Powell. The right heirs under the provisions of this peculiar will were such persons as at the death of J. F. Powell, the decedent, would take the estate if John F. and Virginia Powell were not in existence, or if there

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was no children born to them in existence. These right heirs were parties in interest within the meaning of the statute (section 2079). John F. Powell, having a qualified life estate in the lands and a right to secure an annuity from the lands and a right to live on any one of the plantations free of rent charge, had an interest in the land within the meaning of section 2079. The trustees evidently proceeded upon the theory that the compromise agreement with John F. Powell reduced his claim to a mere annuity, and from their viewpoint he had no interest in the land, though, in my opinion, an annuity charged upon the land as is done by this will was itself an interest in the land within the meaning of said section.

I have always understood that under the laws of this state (subject to certain statutory restrictions not applicable to the facts of this case) a person could dispose of his property in any manner that he saw proper, and that when a person made a valid will and died, the will being valid at the date of his death, there was no power vested either in the heirs, devisees, or legatees, or in the chancery court, that can change the will, eliminate some of its provisions, and write new provisions instead. The proceeding in this case in the chancery court under the compromise agreement, petition for approval, and confirmation by the court of the compromise agreement is something "new under the sun." It is certainly a novel doctrine that the trustees of a will or the executor of a will can pay out attorney's fees to attorneys to attack the will and destroy it. There is no clause anywhere in the will giving such power, and clearly none was intended. It would be absurd to imagine a man making a will with the view and intention that some attorney should receive a fee for an effort to destroy the will. Yet we find in the decree confirming that so-called settlement directing and authorizing the executor and trustees to pay an attorney's fee of seven hundred dollars for an effort to break and destroy the will. It is

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manifest that the power of the trustees to make a conveyance of the lands under the terms of the will had no reference or application to a proceeding to pay debts. On the contrary, by the very terms of the will, the debts were to be paid from other funds than the real estate, and the only possible authority to sell lands in preference to personalty would be derived from the statute (section 2075 of the Code). I think the will is the law of the case, and that it is evident from a study of the entire will that it was the purpose of the testator to have the debts paid out of the money, accounts, and personal effects in preference to realty. I cannot agree with the construction limiting and restricting the language of section 2079. The words "all parties interested shall be cited by summons or publication" should not be restricted to such as own a vested estate in the lands under the common-law doctrine of tenures. Such a construction is contrary to the principles of due process of law as known and understood throughout all the history of English common law, and especially as applied and adopted in America. It has always been recognized that a party should have a hearing before being deprived of his rights, and it has never been the policy of our government nor that of England, as I understand it, to have one person summoned to defend the rights of another person unless in cases of absolute necessity, such as where a person not in being, or not capable of appearing and defending, made a deviation from the rule necessary. It accords with fundamental justice to have all parties having any rights in a matter brought into court so that they may present whatever facts they may be able to present bearing on the judgment or discretion of the court. Under the early statutes of this state (Hutchinson's Code of 1848, p. 666) the provision then in the law bearing on this subject was as follows:

"And the said court shall thereupon cause a citation to issue directing all persons interested in the lands,

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tenements, and hereditaments of the deceased, to appear."

Under the terms of this statute the person must have some interest in the lands, tenements, and hereditaments, and by reference to rules of construction you would exclude such interests as were not named in the statute. When the Code of 1857 was adopted the legislature saw proper to make a change, and instead of undertaking to enumerate the classes of interest, or character of interest, which a person must possess to be notified, it adopted language that carried with it all possible interest flowing out of the ownership, use, or enjoyment of the property, and used the words "all persons interested," omitting the words "in the lands, tenements, and hereditaments." The Code of 1880, and from thence forward, the present language of the statute is "all persons interested." These words are broad enough to embrace every character of right having its root in and springing from the estate of the deceased person. It is more in harmony with just principles to give a broad construction to this language than it is to adopt a narrow or restricted construction. The wisdom of giving such construction, that is, a broad and comprehensive construction, to these words, is demonstrated in the pleadings in this case. We find in the petition to sell lands in the record that only the trustees were made parties, and they failed to file any objection whatever, and failed to suggest or contend that any claim was illegal or unjust, while under the pleadings now before the court it appears from the allegations that the debts were illegal charges for which the estate was not liable. The executor was one of the trustees, and as executor he was charged with the duty of representing the creditors, while as trustee it would be his duty under the theory of the majority opinion and of the chancellor below to represent parties hostile to the creditors' interests. Another one of the trustees had large claims against the estate as a creditor, and his personal interest was hos-

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tile to the life tenant and to the remaindermen, whether vested or contingent; therefore we have two out of three of the trustees acting in capacities that are necessarily adverse and hostile to each other. It does not matter how honest their intentions may have been, whether they were fraudulent or not, the law will not tolerate a person acting in two capacities each contrary to the other. It was of the highest importance to John F. Powell and his wife and to the remaindermen, whether they be vested or contingent, and to the devisees and legatees of the will, that they be heard upon this proposition, and that they have the opportunity and the right to present to the court any legal objection they may have had to the sale of the lands sold under the order of court.

Upon the question of what is an interest in land or in an estate, I refer to Words and Phrases, First Series, vol. 4, pp. 3697 and 3692, and Words and Phrases, Second Series, pp. 1137 and 1132. Numerous other authorities on this proposition and the other proposition involved in the suit will be found in the briefs, and the reporter is requested to state the points made and the authorities relied on in the briefs. I shall not undertake to go into the authorities in this case in any extensive way, but I desire to call the attention of the bar to a note on this subject in *Douney* v. *Seib*, 8 L. R. A. (N. S.) 51 *et seq.*, under the title of "Doctrine of Representations," and to a note in *Rutledge* v. *Fishburne*, 97 Am. St. Rep. at page 763. I shall use some of the ideas contained in these notes, without citation of authorities, to express my views upon the doctrine of representation. "If there is in existence no member of the class to which the unborn persons belong, there is no representation in litigation and a court cannot appoint a representative." There was in court in the present case no representative of the remainderman, either vested or contingent. If there had been some of the parties in existence before the court who would take

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the remainder of the estate at the death of John F. Powell and Virginia B. Powell, in the absence of children born to them, and such persons had made a fair and honest defense, it might be urged that the unborn children of John F. Powell and the nonresident remaindermen were bound by the judgment. "It is a settled principle that where a person is seised in fee of an estate which is liable to be defeated by, or shifted through, conditional limitation or executory devise, the inheritance is not represented in a court of equity by the person whose fee is thus liable to be defeated, except as against himself and those who take under him. If some one of the real or substantial parties to a cause does not hold such a relation to the property involved and to the unborn contingent remaindermen as to make him a legal representative of the inheritance so as to bind it by recovery against them, the contingent remaindermen are not represented in the proceeding and therefore not bound by the decree." Again, "the tests of effective representation are: First, privity of the estate, using the terms in the broad sense; and, second, the absence of conflicting interests between the unborn and the living representatives. If there are ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not *in esse*, unless there is fraud or collusion between the trustees and the first person in whom a remainder in inheritance is vested." It is not sufficient in this case to have the trustees before the court, but at least some one representing the parties who would take the inheritance at the end of the trust must be summoned to appear. I have shown, I think, that there was a conflict of interest between the trustees personally and the representatives which it is said that they represent so as to bind in this cause. To my mind it is shocking to deprive a person

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of a valued right on the theory that he is represented by another person where that other person's rights and interests conflict with the interest of the person he is supposed to represent. Why, in this case, were the trustees so anxious to have John F. and Virgnia Powell drop the suit to contest the will? Their duty was to carry out the will and defend the will against assault; yet we find that to get rid of this attack, in violation of the terms of the will, they turned over to John F. and Virginia Powell not only an increase in their annuity, but a lot of personal property, and in addition to that paid attorney's fees to their attorneys to the amount of seven hundred dollars. It is clear to my mind that the testator for some reason distrusted the ability of his son to manage and control this property, but he intended to secure to his son a competence during his life and a place at least where he could have a home and a living from his estate. It is further my conviction from a study of this will that the testator, believing that no children could be born to John F. and Virginia Powell, desired to retain his property in his own family rather than have it go to the wife of John F. Powell in case she should survive him and at her death to her blood instead of his own. The proceedings that have been taken in this cause, and which have received the sanction of this court through a majority of its members, has practically destroyed this will. It may not be a wise thing to permit a man to tie up his property in a trust estate, but the law recognizes his right to do so, and it is the solemn duty of the court to protect this right so long as the law authorizes it. The pleadings show that the management of the trustees has so reduced the property by the course they have taken in dealing with it that the income is insufficient to pay the annuity to John F. Powell and his wife. There is nothing clearer in the will than it was the purpose of the testator to maintain a support for his son and his son's wife during their lives. I can bring myself to no con-

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clusion that would sanction the power of the trustees to vary, change, or modify the terms and directions of the will. I think, therefore, that the cause ought to be reversed, and the cause heard on its merits. It may be that the evidence would not sustain the allegations of the bill, but if it does, certainly relief should be granted. If the allegations that no notice was served on John F. and Virginia Powell, and none on any remainderman, be true, the sale should be set aside and held for naught. If it be true, as alleged, that the executor and trustees represented conflicting interest, the sale should be set aside for this reason.

I am authorized to state that SMITH, C. J., concurs in this dissent.

LUCKETT v. BRICKELL.

[76 South. 502, Division A.]

1. EXECUTORS AND ADMINISTRATORS. *Power to borrow money. Decree of chancery court.*

Where under the will the executor and trustee had no authority to borrow money and pledge the stock of the estate as security therefor, they could not do so under an unauthorized decree of the chancery court.

2. REPLEVIN. *Equitable defenses. Subrogation.*

In an action of replevin by an administrator *Cum testamento annexo* for stock certificates pledged by a former executor and trustee to secure a note to defendant for money borrowed by the executor, even though such money was applied to the payment of the debts of the estate and even though the estate was bound therefor by subrogation to the defendant, this equitable defense of subrogation could not be pleaded in a court of law, as it was not of such a character as would in a court of equity transfer the legal title of the property to the defendant.

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APPEAL from the circuit court of Yazoo county.

HON. W. H. POTTER, Judge.

Action of replevin by H. H. Brickell, administrator *cum testamento annexo,* against Mary V. Luckett. From a judgment for plaintiff, defendant appeals.

This is an action of replevin brought by the appellee, administrator c. t. a. of the estate of J. F. Powell, deceased, to recover of appellant certain certificates of stock pledged by the executor of the will of said decedent, for the purpose of securing payment of a certain promissory note, executed by said executor, as such, in favor of appellant, for money borrowed of appellant by said executor for the use of the estate of said Powell.

J. F. Powell, who was a large planter and merchant, died in the year 1909, owning thirteen plantations, and a large mercantile business. At the time of his death he owed considerable money, amounting to more than one hundred thousand dollars. He died testate, leaving a will, which is set out in full in the case of *Brickell* v. *Lightcap* (No. 19049) 76 So. 489.

R. W. Crook was made executor of the will; and T. H. Campbell, Sr., and R. W. Crook and the Bank of Yazoo City were made joint trustees of the residue of his property, after the payment by the executor of certain legacies, and the satisfaction of certain debts. Among other debts which he owed at the time of his death was an indebtedness amounting to sixty-four thousand, nine hundred and sixty-six dollars and sixty-eight cents due the Bank of Yazoo City, which indebtedness was evidenced by notes, and a small portion of it by an overdraft. This claim was duly probated.

On March 28, 1910, the indebtedness due by the estate to the Bank of Yazoo City had been reduced to thirty-one thousand, eight hundred and thirty-two dollars and forty cents, and a loan was obtained from said bank for forty thousand dollars for the estate, and the executor gave his note for that amount and paid off said notes of the Powell estate, and deposited the difference to the

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credit of the estate, but, with the consent of the executor, the bank retained certain collateral held by it to secure the new loan. Thereafter, about July 9, 1910, an additional loan of ten thousand dollars was obtained for the estate from said bank; the amount being placed in the checking account of the executor. Thereafter, on January 9, 1911, the executor and the trustees petitioned the chancellor, in vacation, to borrow fifty thousand dollars to pay off debts and run the mercantile and farming business of the estate, and the chancellor allowed the petition, entering the following decree:

"This matter coming on to be heard this day in vacation, on petition of R. W. Crook, executor of the last will and testament of J. F. Powell, deceased, and the Bank of Yazoo City, T. H. Campbell, and R. W. Crook, trustees of the last will and testament of said J. F. Powell, deceased, to borrow money for the purpose of paying off the balance of indebtedness owing by the decedent in his lifetime, and for the purpose of carrying on his plantations and mercantile business, and the chancellor being fully advised in the premises, it is ordered, adjudged, and decreed that R. W. Crook, executor, and the trustees of said estate, are hereby authorized and empowered to carry on and operate the plantations owned by J. F. Powell in his lifetime, and said R. W. Crook is authorized to carry on the mercantile business, and that for said purpose said executor and said trustees are hereby authorized and directed to negotiate a loan with the Bank of Yazoo City or any other source, for an amount not to exceed fifty thousand dollars at a rate of eight per cent. discount, provided it cannot be obtained for less from some other bank or corporation or person, and that said executor and trustees are hereby authorized, for the purpose of securing said loan, to assign a sufficient amount of notes, bank stock, and accounts, and the rents from said plantations, for the purpose of negotiating said loan from the said

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Bank of Yazoo City or any other person or corporation."

Thereafter, on March 9, 1911, the executor obtained the following decree authorizing them to borrow and additional twenty-five thousand dollars:

"In the Matter of the Estate of J. F. Powell, Deceased.

"This matter coming on to be heard this day on the petition of R. W. Crook, executor of the estate of J. F. Powell, deceased, and T. H. Campbell, the Bank of Yazoo City, and R. W. Crook, trustees of the estate of J. F. Powell, deceased, that they be permitted to borrow twenty-five thousand dollars in addition to the fifty thousand dollars which they have been heretofore authorized to borrow, and the court being fully advised in the premises, it is therefore ordered, adjudged, and decreed that said R. W. Crook, executor, and said T. H. Campbell, the Bank of Yazoo City, and R. W. Crook, trustees of the estate of J. F. Powell, be and are hereby authorized and directed to borrow twenty-five thousand dollars in addition to the fifty thousand dollars which they have already been authorized to borrow by this court; and said executor and trustees are authorized to pledge as security any of the personal property of the estate of J. F. Powell, deceased, and to borrow the same at a rate of interest not greater than 8 per cent. per annum. It is further ordered, adjudged, and decreed that said executor and trustees be, and are hereby, authorized to borrow said sum of twenty-five thousand dollars from the Bank of Yazoo City, provided the same can be obtained at a rate as reasonable as they can get elsewhere."

On March 23, 1911, part of the original loan of forty-thousand dollars had been repaid. The estate on this date owed the Bank of Yazoo City forty-nine thousand, two hundred and forty-five dollars and forty cents, which consisted of a portion of the loan of forty thousand dollars obtained on March 28, 1910, and the loan of ten thousand dollars obtained in July, 1910, and in-

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terest on same, together with an overdraft of fourteen thousand and seventy-seven dollars and seven cents.

Thereupon the executor borrowed forty-five thousand dollars from the Bank of Yazoo City and fifteen thousand from three individuals one of whom was the appellant in this case, from whom he borrowed the sum of five thousand dollars, and executed his note as executor therefor; the note being signed also by the three trustees. On the same day he collected from other sources one hundred and seventy-five dollars due the estate, and on the same day deposited to his credit as executor with the Bank of Yazoo City the sum of sixty thousand, one hundred and seventy-five dollars, and drew checks to take up the old notes, aggregating thirty-five thousand one hundred and sixty-eight dollars and thirty-three cents, and another check for one hundred dollars, withdrawn in cash, which, after covering the overdraft of fourteen thousand, seventy-seven dollars and seven cents, left a balance to the credit of the executor on said date (March 23, 1911) of ten thousand, eight hundred and twenty-nine dollars and sixty cents.

When the loan of five thousand dollars was obtained from appellant, the negotiations were made through the president of the Bank of Yazoo City, with whom appellant kept her deposits, and this bank turned over to appellant, together with the notes signed by the executor and trustees, certain collateral consisting of certificates of bank stock, and certificates of stock in a warehouse company, which certificates had been indorsed in blank by Powell in his life time, and were then in possession of the Bank of Yazoo City. The executor also indorsed the said certificates of stock when delivering same to appellant. Appellant was advised by the president of the Bank of Yazoo City that the loan of her money was obtained under authority of the chancery court for the purpose of paying off the indebtedness owing by the decedent.

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Afterwards, on January 1, 1913, the five thousand dollar note of March 23, 1911, not having been paid, the executor gave the appellant a new note for five thousand dollars, under authority of chapter 143, Laws of 1912, authorizing a renewal of obligations by executors. This note was still unpaid at the time the instant suit was begun by the appellee, as administrator c. t. a. of the estate of said Powell; the executor Crook having in the meantime resigned. In this suit the administrator seeks to recover possession of the certificates of stock held by appellant as collateral for the note given her by Crook, executor, for five thousand dollars.

There was a plea of the general issue, and on the hearing the court gave a peremptory instruction for the plaintiff, from which appellant prosecutes this appeal.

It is the contention of the administrator that the executor and trustees were without power to bind the estate of the decedent for the loan of the money obtained of appellant, and that the decree of the chancellor authorizing the executor to procure loans for purposes therein set out was a nullity. The appellant contends that the executor had the power, under the will, and under the decree of the court, to procure the money, and that the money procured from appellant was applied to the debt of decedent owing to the Bank of Yazoo City, and it was her understanding with the president of said bank that her money would be used to pay this debt, and that the collateral held by the bank to secure the said debt of said decedent, incurred during his lifetime, was thereupon delivered to appellant. This contention is substantiated by the testimony of the officials of the Bank of Yazoo City.

It is next contended by the appellee that she is entitled to subrogation to the rights of the Bank of Yazoo City, which was a creditor of the estate of said decedent, and which delivered to her the collaterals here sued for, and obtained from her money for the purpose of taking up a loan held by said bank, which was in

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fact a probated claim against the state of said decedent; and, further, that she had a right under section 2082, Mississippi Code of 1906, to defend a suit at law to retain possession of this collateral until the rights of all parties were adjusted.

The administrator contends that the right of subrogation is not cognizable in the court of law, where equitable defenses are not available, until they be such as in a court of equity, will entitle a defendant to have the legal title transferred to him by the plaintiff; that the decree of the chancellor is invalid because the chancery court has no authority to authorize an administrator to borrow money for the estate to carry on a farming and mercantile business; that the will gives no such authority in this case; and, further, that section 2082 of the Code of 1906 does not apply here for reasons apparent upon its face.

Green & Green, for appellant.

Holmes & Holmes, W. A. Henry, E. L. Brown, and *Edward Mayes,* for appellee.

HOLDEN, J., delivered the opinion of the court.

The executor and trustees had no authority under the will to borrow the money from appellant for the estate and pledge the stock as security therefor; nor were they able to do so lawfully by the unauthorized, illegal, and void decree of the chancery court.

If it be conceded that the five thousand dollars loaned by appellant to the executor and trustees was applied by them to the payment of probated debts due by the estate, and the estate is thereby bound by subrogation to appellant, through the executor and trustees, as contended, this equitable defense of subrogation cannot be pleaded in a court of law, as it is not of such a character as would in a court of equity transfer the legal title

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of the property to the defendant. Therefore this defense cannot be made in this case of replevin in a law court; it would be proper in a chancery court. *Bonner* v. *Lessley*, 61 Miss. 392; *Hill* v. *Billingsly*, 53 Miss. 111; *McGee* v. *Wallis*, 57 Miss. 638, 34 Am. Rep. 484.

Section 2082 of the Code of 1906 has no application to the case at bar.

Judgment affirmed.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1917

SOUTHERN SCHOOL BOOK DEPOSITORY *v.* DONALD, ET AL.

[76 South. 519, Division A.]

ACTION ON ACCOUNT. *Pleading. Amendment during trial. When proper.*

Where in a suit upon an open account objection was made that one part of the account was not itemized it was reversible error for the court not to allow the plaintiff to amend the account so as to properly itemize the same.

APPEAL from the circuit court of Tallahatchie county. HON. D. E. DINKINS, Judge.

Suit by the Southern School Book Depository against J. L. Donald and others. From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Fred M. West, for appellant.

It is the settled law of this state that, on appeal from a justice of the peace court to circuit court a trial *de novo* shall be had, so that the merits of the case may be fully shown. Code 1906, section 86; Code 1906, section 775; *Russell, Admn,* v. *Moore,* 8 S. & M. 700; *Stier* v. *Surget,* 10 S. & M. 154; *Porter* v. *Fooshee,* 41 Miss. 337; *McCleary* v. *Anthony,* 54 Miss. 708; *Callahan* v. *Newell et al.,* 61 Miss. 437; *Boisseau & Martenez* v. *Kahn,* 62 Miss. 757;

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Dreyfus & Weil v. *Mayer & Co.*, 69 Miss. 282; *Mitchell* v. *McDavitt*, 70 Miss. 609; *Cazeneuve* v. *Martinez*, 28 So. 788; *Bowles* v. *Dean*, 84 Miss. 376; *Redux* v. *Bambre*, 85 Miss. 165; *Helton* v. *McLeod et al.*, 46 So. 534; *McCarthy* v. *Key*, 39 So. 780; *Kelly* v. *Casualty Co.*, 40 So. 1; *First Nat. Bank* v. *Fain Gro. Co.*, 40 So. 6; *McCue* v. *Massey*, 43 So. 2; *Jones* v. *Clemmer*, 54 So. 4; *Greenwood Groc. Co.* v. *Bennett et al.*, 58 So. 482; *Same case*, 101 Miss. 573; *Grace* v. *Lloyd*, 104 Miss. 613.

We believe that a further search would disclose still further authorities, but we believe the above are sufficient.

It is certainly the law of this state that amendments in the circuit court are to be liberally allowed so that the merits of the case may be presented to the court and jury; and, we, respectfully submit that the action of the learned trial court in not permitting appellant to amend, was contrary to law and justice, and was in the face of the statutes and decisions of the legislative body and the highest court in the State.

A. A. Hearst, for appellee.

There is only one question presented on this appeal for the court's determination, viz; whether it was reversible error for the circuit court to refuse to allow the plaintiff to amend its statement of its cause of action as it sought to do at the trial in the circuit court.

In justification of the court's not allowing the amendment, we make the following observations: First, it was a matter resting entirely within the trial judge's discretion as to whether the amendment should be allowed, and his ruling in disallowing the amendment was not an abuse of that discretion. Section 775, Code 1906, gave the trial court power to allow the amendment, but left it in the court's discretion as to whether he would allow the

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amendment, and whether the court allowed or did not allow the amendment would not be reversible error. The case was being tried in the circuit court and the plaintiff was offering its evidence when leave to amend was asked, and after it had been tried in the justice court and, after the plaintiff had already had every oportunity to make any amendment it desired. Hence we submit that it was left to the discretion of the trial judge whether the amendment should be allowed, and the disallowance of the amendment was no abuse of that discretion and was not reversible error.

Second, the original statement of plaintiff's cause of action was not a sufficient statement of his cause of action as to be amendable. It was no cause of action at all. It was nothing. It was merely an insufficient statement of a cause of action; it was no statement at all. It was merely a statement of "merchandise" which meant nothing. So we insist that it was not sufficient to permit of an amendment. Before the plaintiff could be permitted to amend his statement of cause of action, he ought to have had some sort of a statement of his cause of action.

Third, the amendment which the plaintiff sought to make would not have helped the matter. If the amendment had been allowed, his statement of his cause of action would still have been insufficient. The plaintiff did not ask to be permitted to amend his statement by filing an itemised statement of the account, but asked to file the invoices of the account. Certainly these invoices would not have been sufficient. The only amendment which could have helped the matter would have been to file an itemised statement of the account sued on. This was not asked for by the plaintiff. So if the amendment had been allowed the plaintiff's statement of its cause of action would still have been insufficient.

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SMITH, C. J., Delivered the opinion of the court.

The Southern Schoolbook Depository seems to be a partnership composed of Burgess Smith and Victor R. Smith, doing business at Jackson, Miss., as a state schoolbook depository, under chapter 219, Laws of 1910. It designated the Tutwiler Drug Company as its agent for the distribution of schoolbooks at Tutwiler, Miss., and this suit is to recover the value of schoolbooks delivered to that company for distribution under its contract with appellant, for the faithful performance of which it had executed to appellant a bond, on which appellees are sureties. The account sued on consists of seven items, of which the first is as follows:

"Sept. 14. Mdse.....$27.07."

—and the others are of like character, varying only as to the date and the value of the merchandise sold.

On objection being made at the trial by appellees that this was not a sufficient statement of the account sued on, appellant offered to amend by attaching thereto copies of the invoices of books delivered, thereby setting forth in detail each item of the account sued on. This the court declined to permit it to do, and on motion of appellees excluded appellant's evidence, and instructed the jury to return a verdict for appellees. This the jury did, and there was a judgment accordingly. The amendment should have been permitted.

Reversed and remanded.

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UNIVERSITY OF MISSISSIPPI v. DEISTER.

[76 South. 526, Division A.]

1. COLLEGES AND UNIVERSITIES. *Professors. Contracts.*
Under the facts set out in its opinion the court held that the letter and telegram mentioned therein and upon which suit was based did not constitute a written contract between the appellant and the appellee as to the number of years appellee was to serve or as to what his salary was to be or would be as a full professor.

2. COLLEGES AND UNIVERSITIES. *Professors. Contract. Dismissal.*
After the passage of the order by the board of trustees as set out in the opinion of the court, plaintiff's employment was subject to such order of the board, which became a part of his contract and thereunder the board of trustees had a right at their pleasure to dismiss him from his professorship.

APPEAL from the circuit court of LaFayette county.

HON. J. L. BATES, Judge.

Suit by J. L. Deister against the University of Mississippi. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Edgar Webster, for appellant.

W. E. Stone and *L. C. Andrews,* for appellee.

SYKES, J., Delivered the opinion of the court.

The appellee and cross-appellant, plaintiff in the court below, filed suit in the circuit court of Lafayette county against the University of Mississippi for a part of four years' salary alleged to be due him under his contract with the chancellor of the University, for services as a full professor of Romance languages. The lower court

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peremptorilly instructed the jury to return a verdict in favor of the plaintiff for five hundred and twenty-five dollars as salary due him for the months of June, July, August, and half of September, 1913, at the rate of one hundred and fifty dollars per month. From this judgment the University of Mississippi prosecutes an appeal, and Dr. Deister a cross-appeal.

It is claimed by the appellee and cross-appellant that there was a written contract entered into between the University and Dr. Deister, based upon a letter from Dr. Brown, a professor of the University, written to Dr. Deister, reading as follows:

"University of Mississippi.

"Graduate Committee University of Miss.
"Calvin S. Brown, Chairman. August 8, 1908.

"Mr. John L. Deister, Parkville, Mo.—Dear Sir: Dr. Weeks has sent me your name. There is an instructorship in this University in Modern Languages for next year at one thousand dollars; the second year it should be an assistant professorship at one thousand and five hundred dollars; and the third a full professorship at two thousand dollars, if the man proves to be the right man. By the resignation of one of our professors, I am called upon to act as head of both the Romanic and the German departments; naturally I shall wish to be rid of one as quickly as possible. The new instructor will be called upon to teach both French and German; possibly Spanish, too, under my direction.

"Are you in a position to accept this instructorship, if it should be offered to you? Which of these languages do you speak? Which is your native tongue? What is your age? Are you married?

"Very truly, CALVIN S. BROWN"

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—and a telegram sent by Chancellor Kincannon the then chancellor of the University, to Dr. Deister, reading as follows:

"8/21/1908. Received at 2 p. m. Dated, Oxford, Miss. To Prof. J. L. Deister, R. F. D. 3, Parkville, Mo.

I hereby tender you Assistant Professorship Modern Languages Miss—University, salary thousand dollars per annum. Professorship Romanic Languages probably year hence. Wire answer. A. A. Kincannon."

In response to the letter above quoted, Dr. Deister made a trip to the University of Mississippi and discussed with Dr. Brown and Chancellor Kincannon the duties of the office. Shortly after returning to his home in Missouri he received the telegram from Chancellor Kincannon. He accepted the position tendered him in the telegram, served the first year as assistant professor of modern languages, and was paid for his services in accordance with the telegram. The next scholastic year at the University, which began in September, 1909, he was promoted to a full professorship, and was thereafter paid during the balance of the time he was at the University at the rate of one thousand and eight hundred dollars a year—or one thousand and five hundred dollars a year and was given three hundred dollars for commutation money. Commutation money is allowed professors when they are not furnished with residences by the University. This amount of one thousand and eight hundred dollars a year is paid in twelve monthly installments of one hundred and fifty dollars at the end of each month.

The testimony in the case is practically uncontradicted, and we shall consider that of Dr. Deister himself. This witness testified that at the end of his first year's service he was made a full professor, but that the chancellor told him that owing to the fact that there was a shortage of funds, and that the University was in debt, and there

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were other men making claims, that he could not pay him the full salary of two thousand dollars, but that he agreed to pay him one thousand and five hundred dollars and three hundred dollars for his rent. That for the next scholastic year, beginning September, 1910, and ending September, 1911, the chancellor again made the same excuse as above set out, and held out the hope that the following year, after the meeting of the legislature, he would be able to pay him a full salary of two thousand dollars. In response to a question of his attorney as to whether or not he consented to work for the year 1910-11 for one thousand and eight hundred dollars, he answered, "Yes, I went ahead and worked for that salary," for which work he was paid. For the scholastic year 1911-12, he states he talked with the chancellor several times about this salary, but could not get any definite answer from him. That summer he went to Europe, and on his return he had another talk with the chancellor along the same lines, and was told that the chancellor had recommended the increase in salary, but the board of trustees had declined to give it to him. With this information he worked that year for the salary of one thousand and eight hundred dollars, which was paid him. He states that he did not accept it in full settlement of his salary, but that he accepted the money. It is also shown in the record that some time in the year 1911 he took up with members of the board of trustees the question of raising his salary to two thousand dollars a year. He wrote letters to members of this board, and also wrote a letter to the Governor about the same matter in the year 1912. In other words he had ascertained some time in 1911 that the board of trustees were the final arbiters as to the amount of salary to be paid professors and instructors at the University. At the end of the scholastic year 1911-12, all of the professors were re-elected

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for the ensuing scholastic year at the same salaries paid them the previous year, as is shown by the written proceedings of the board of trustees. In February, 1913, Dr. Deister wrote a letter to Chancellor Kincannon and the board of trustees, asking that he be granted the full salary of two thousand dollars a year with commutation. In this same letter he also asks for a year's leave of absence. He concluded the letter by stating that if the above requests were not granted, then he asked that his resignation be accepted to take effect at the end of that scholastic year, which was the 15th of September, 1913. In response to that letter his resignation was accepted by the board, to take effect on September 15th. After his resignation was accepted Dr. Deister became quite insistent that the chancellor and the board of trustees allow him the salary of two thousand dollars a year and three hundred dollars commutation money for the entire time he had been a full professor of the University. He had several conversations with individuals members of the board, and indicated to some of them that if this claim was not paid he would institute legal proceedings to collect this entire sum. At the meeting of the board of trustees, either the latter part of May or the 1st day of June, 1913, this board dismissed Dr. Deister from his professorship at the University. That scholastic year, for which all the professors had been chosen by this board, did not end until the middle of September.

Upon the objection of counsel for plaintiff, the defendant was not allowed to show the reasons why Dr. Deister was dismissed. An examination of the record, however, leads us to the inevitable conclusion that it was because the board thought he had been perniciously active and unduly annoying them with his many requests for a raise in salary. On March 27, 1912, the board of trustees adopted the following written by-law:

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"Tenure of Service.

"The members of the faculty and all officers hereafter employed by any of the higher educational institutions of the state of Mississippi shall hold their respective positions during the pleasure of the board, and not otherwise; and it shall be the duty of the president of each of said institutions, of which he may be the head, to inform such one that his or her employment is subject to this condition in reference to its termination."

This was before the beginning of the last scholastic year during which Dr. Deister was with the University. The testimony of the plaintiff in the court below showed that the chancellor of the University read the above by-law to the professors during the year 1912.

The letter and telegram upon which this suit is based do not constitute a written contract between the appellant and the appellee, as is contented by the appellee. The letter is no part of a contract at all, but was merely a polite inquiry on the part of Dr. Brown as to whether or not the appellee could accept the position if tendered him, stating the probability of promotion and his idea of the salary appellee would get should he be selected for the position. The telegram from Chancellor Kincannon was merely an offer of the assistant professorship for one year at a salary of one thousand dollars a year. This contract was carried out. The latter part of the telegram states the probabilities of the promotion which may follow, but does not state the salary. If it did it would make no difference. The record also shows that appellee was employed from year to year by the board of trustees, upon the recommendation of the chancellor, and that he was informed by the chancellor of the salary he was to receive for this employment. It is true that he always contended that it was too small and that he should be paid a salary of two thousand dollars, as others, if not all, the professors in the University received. Though protesting, he

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always accepted the position and cashed his monthly checks. The professors of the University were elected for each scholastic year by the board of trustees and their salaries were fixed by this board. The chancellor of the University usually made whatever recommendations he desired as to the amount of these salaries. Whether or not the appellee knew this the first year he was promoted to a full professorship makes no difference, for the reason that Chancellor Kincannon informed him what that salary would be. Having no other contract with the University, when he accepted the position, knowing what the salary would be, he necessarily agreed to accept that salary as full compensation. This fact is true for all the other years he remained there. The record, however, shows that he found out very soon that the salaries were fixed by the board of trustees, and he soon began to appear before the board and tried to get a raise in salary. It is quite significant that in the letters written to the members of the board, and in his statements before the board, his contention seems to have been always for a raise in salary and not an attempt on his part to collect any back salary. This was the situation until after his resignation was accepted. After that time, however, he began, for the first time, to claim that the University owed him this back salary. There was no imposition whatever practiced upon the appellee, either by the chancellor or by the board of trustees. He was at all times fully informed as to what his salary would be, and this salary he received. We therefore conclude on this proposition that he had no written contract as to the term of years he was to serve at the University, or what his salary was to be or would be as a full professor. The learned trial judge was correct in not submitting this question to the jury.

On the question of direct appeal, the board of trustees was in full control and management of the University and its affairs. Subject to the laws of the state of Mississippi, it was entirely lawful for them to adopt the by-

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law passed by them on March 27th to the effect that the tenure of offices of all professors and employees of the University of Mississippi would be at the will and pleasure of this board. Time and again he had read the minutes of the board and had also seen this order on the minutes. After this order was passed, viz. in September, 1912. he, along with all the other professors, was elected for the ensuing scholastic year by an order shown on the minutes of the board. This employment, therefore, was subject to the above order of the board, which by-law became a part of his contract, and under which the board of trustees had a perfect right at their will and pleasure to dissmiss him from services of this institution. It therefore follows that the lower court was in error in not granting the defendant the peremptory instruction asked by it, from which it follows that the case is reversed, and judgment will be entered here in favor of the defendant.

Reversed.

MECHANICS & TRADERS INS. CO. ET AL. v. BUTLER.

[76 South. 521, Division A.]

1. GARNISHMENT. *Answer. Sufficency. Statute.*

Under our statute on garnishments, it is the duty of the garnishee to expressly admit or deny any indebtedness to the defendant in attachment or execution as the case may be, and upon his failure to to do the plaintiff is entitled to a judgment by default unless the answer contains sufficient matter to entitle the garnishee to amend, in which event the plaintiff must except thereto, and if the exception should be sustained by the court, leave should be given to the garnishee to answer over, and upon his failure so to do judgment should be rendered against him by default for want of a sufficient answer.

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2. SAME.

Where the answer of the garnishee simply amounts to an allegation that he is unable to say whether or not he is indebted to the defendant, but that in the event he should afterwards ascertain that he is so indebted he will with the permission of the court, file an amended answer setting that fact forth. In such case the proper course for plaintiff to pursue with such answer is to except thereto, which exception should be sustained by the court and judgment for want of a sufficient answer awarded, unless the garnishee ask leave to amend, in which event he should be permitted so to do, and if dissatisfied with the amended answer plaintiff should then take issue upon the answer and the cause should then proceed to trial thereon.

3. SAME.

Where the answer of the garnishee requested permission to file amendments thereto at a later day thereby continuing the case in court until it should be disposed of in a proper manner, it was not necessary for exceptions to have been filed at the same term at which the answer was filed.

4. GARNISHMENT. *Answer. Judgment.*

Under our garnishment statute, an answer of garnishees admitting an indebtedness due the defendant and allegeing that it was subject to certain attachments was too vague and indefinite to raise an issue relative thereto, so that plaintiff was entitled to judgment on the answer for the amounts admitted to be due.

5. GARNISHMENT. *Answers. Contest. Statute.*

In such case, the plaintiff lost the right to contest such answer, and obtain judgment for larger sums than those admitted to be due by the answer, where he did not contest the answer of the garnishee during the term at which it was filed, or obtain leave from the court to contest it, at a subsequent term, since under section 2353, Code, 1906, the garnishee's answer must be contested at the term at which it was filed or leave then obtained from the court to contest the same at a subsequent term.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, Judge.

Suit by G. W. Butler against Mrs. R. Freedman, with garnishment against the Mechanics & Traders Insurance Company and others. From a judgment for plaintiff against the garnishees, they appeal.

The facts are fully stated in the opinion of the court.

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McLaurin & Arminstead, for appellant.

We think that this case is governed by section 2353 of the Code of 1906, and the decisions thereunder, and under similar statutes in previous codes. By reference to the above section of the code the court will see that it is made the duty of the attaching creditor, "at the term when the answer is filed," unless the court grants further time, to contest the answer of the garnishee in writing, specifying in what particular he believes the answer to be incorrect, and thereupon the court shall try the issue at once. unless cause be shown for a continuance, as to the truth of the issues. All of the answers of the appellants (garnishees in the court below) were filed at the return term of the circuit court of the second judicial district of Coahoma county, which was on the first Monday of March, 1915. and the first Monday of March, 1915, was the first day of March, 1915. This term of court lasted for twenty-four days. Acts of 1914, p. 324. No contest in writing was made of the several answers of these garnishees (appellants here) at this return term, nor was there any order of the court granting further time in which to contest the answers of these garnishees, and consequently there was no issue made up by the court to be tried at once, as specified in the statute, and after this return term the garnishees' (appellants') answers became conclusive. *Smither* v. *Fitch,* 1 S. & M. 541; *Williams* v. *Jones,* 42 Miss. 270; *Gordon* v. *Moore,* 62 Miss. 493-496; *Hattiesburg Trust & Banking Co.* v. *Hood,* 97 Miss. 340-344.

In the case of *Williams* v. *Jones,* 42 Miss. *supra,* it is said if it be left in reasonable doubt whether the garnishee is chargeable or not, he is entitled to judgment in his favor. These answers of these various appellants as garnishees having been filed at the return term of the garnishment writ, to wit: The March term, 1915, and no contest of said answers having been filed until July 19, 1915, after the May term of the circuit court of the

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second judicial district of Coahoma county had ended, made it unnecessary for these garnishees to give any further attention to these answers, as all of them denied any indebtedness to the defendant in attachment, except the German Fire Insurance Company and the Globe & Rutgers Fire Insurance Company, and they advised that prior writs of garnishment had been served upon them in the same case by creditors of the same debtor in a sister state, which were prior in time, and prior, therefore, in preference, and the court could not ignore these facts. No contest having been made at the return term of the answers, and no order having been granted by the court giving further time in which to file the contest, entitled each one of these garnishees to be discharged from any further liability, and any judgment rendered against them after the return term, at which their answers were filed, was null and void. *Ice Company* v. *Cook Well Co.*, 71 Miss. 886-888, 97 Miss. 343-344.

The answers of the German Fire Insurance Company and Globe & Rutgers Fire Insurance Company became then conclusive as given at the return term of the circuit court of the second judicial district of Coahoma, county, to wit: the March term 1915, but in these two answers an indebtedness was admitted, but the court was advised that it was subject to four other previous garnishments in the state of Tennessee and returnable on the 15th day of December, 1915. These garnishments in a sister state were ignored and judgment taken against these companies one year after they had filed their answers, to wit: on the 17th day of March, 1916, in violation of the constitutional protection to the full faith and credit required by the Constitution of the United States to be given to the records and judicial proceedings of a sister state. These prior judgments in the state of Tennessee doubtless consumed all of the amount admitted to be due and this would have been shown if the contest had been made at the return term as required by law, and we respectfully submit that the judgments as to the German

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Fire Insurance Company and the Globe & Rutgers Fire Insurance Company are void, not only for the reason that no contest was filed at the return term, by which their answers became conclusive, as did the answers of those other Insurance Companies among the appellants who denied any indebtedness whatever to the defendant in attachment, but the judgment against the German Fire Insurance Company and the Globe & Rutgers Fire Insurance Company are void, not only for the reason that no contest was filed at the return term, by which their answers became conclusive, as did the answer of those other insurance companies among the appellants who denied any indebtedness whatever to the default in attachment, but the judgment against the German Fire Insurance Company and the Globe & Rutgers Fire Insurance Company is void for another reason, and that is that the judgments taken were in violation of the full faith and credit clause of the Constitution of the United States above set forth, in that it ignored the garnishments that had been served upon these same garnishees in a sister state.

On the foregoing authorities, and for the reasons set forth, it is respectfully submitted that the judgments against the several appellants in this cause as garnishees are irregular and void, and that the same should be reversed and the garnishees finally discharged, as should have been the judgment of the lower court, and this court now rendering such judgment as the lower court ought to have rendered, under section 4919 of the Code of 1906, should, if we are correct in our contentions, render final judgment in the supreme court, discharging these garnishees from any liability whatever in this cause.

W. E. Denton, for appellee.

There were no defects in the proceedings and judgments against Mrs. S. R. Friedman, the defendant, in the lower court, under the well known statutes governing

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such proceedings; but if such defects existed they cannot be availed of by these garnishees unless they were such as to render the judgments against the defendant void. 20 Cyc., 1085; *Fields* v. *McKinney,* 60 Miss. 763; *Saddler* v. *Prairie Lodge,* 59 Miss. 572; *Benson* v. *Halloway,* 59 Miss. 358.

It is contended that appellee did not traverse the answer filed by appellants in the garnishment proceedings below within the time required by the statute. This is an appeal upon the naked record, and the facts which were known to the court below are not known to the supreme court; but if the delay complained of actually existed, and if the lower court did not extend the time for filing these traverses, appellants cannot now complain, because it was their duty to raise the point in the court below. They should have raised this point by making a motion to quash the writ of garnishment and if they had done so the merits of that controversy would now be before the supreme court. 20 Cyc. 1125.

The supreme court will not entertain questions which were not raised in the trial court. Every presumption will be indulged in favor of the judgment below; and, in the absence of the proof from the record, the judgment of the trial court should be affirmed if there is any possibility of its correctness under any conceivable state of case which would have arisen under the pleadings. *Cavel* v. *Smith,* 69 Miss. 296; *Bowers* v. *Ross,* 55 Miss. 235; *Kellum* v. *State,* 64 Miss. 226; *Bernham Bros.* v. *Brogan,* 66 Miss. 184; *Kelly* v. *Harrison,* 69 Miss. 856.

The extreme extent to which appellate courts will go in presuming the rightfulness of judgments in the trial court is very well illustrated by the text and myriad cases cited in 3 Cyc. 375 to 324 inclusive. I especially call the attention of the court to note 74 on page 294 (ib.) where numerous cases are cited holding that preliminary proceedings, upon an incomplete record, will be presumed to have occurred, although missing from the record.

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In cases of this kind, it is proper for the trial court to permit plaintiff to file his contest of garnishee's answer at a term subsequent to the term required by the statute, if the contest is filed before an order is taken discharging the garnishee. *Banks* v. *Hunt,* 70 Ga. 741.

SMITH, C. J., delivered the opinion of the court.

This record presents the separate appeals of the Mechanics' & Traders' Insurance Company, Aetna Insurance Company, National Fire Insurance Company, Stuyvesant Insurance Company, German Fire Insurance Company, and Globe & Rutger's Fire Insurance Company, from separate judgments rendered against each of them as garnishees in a garnishment proceeding.

In January, 1915, appellee instituted a suit by attachment in the circuit court of the Second judicial district of Coahoma county against Mrs. R. Friedman to recover an indebtedness alleged to be due him, and alleging that she was about to remove herself or property out of the state, and suggested that appellants were indebted to her, whereupon writs of garnishment were issued and served upon them as provided by law. The answers of the Stuyvesant Insurance Company, Mechanics' & Traders' Insurance Company, National Fire Insurance Company, and Aetna Insurance Company, after setting forth that the garnishee was not indebted to the defendant, did not have any of her effects in its possession or under its control, that it did not know or believe that any other person was indebted to her, and that it did not know or believe that any other person had effects belonging to her or in his possession or under his control, proceeded as follows:

"The said garnishee now states to the court that it carried a policy of insurance on the defendant's, Mrs. R. Friedman's, property, and that the same has not been adjusted, and it has not at this time been determined whether there is any liability under said garnishee's policy or not, and said garnishee asks that if it shall be subsequently determined that there is any liability un-

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der said policy, that this garnishee be permitted to make a supplemental answer to this writ, after learning definitely what sum, if anything, is due said defendant."

The answers of the German Fire Insurance Company and the Globe & Rutger's Fire Insurance Company each admitted an indebtedness due by each of these companies to Mrs. Friedman of eight hundred seventy five dollars and fourteen cents, negatived the other interrogatories contained in the writs of garnishment, and then proceeded as follows:

"This indebtedness, however, is subject to the following attachments:

"Attachment No. 1, served through F. M. Guthrie, J. P., Memphis, Tenn., on the 5th day of December, 1914, in favor of the National Bedding Company, and returnable on the 15th day of December, 1914.

"Attachment No. 2, served through F. M. Guthrie, J. P., Memphis, Tenn., on the 5th day of December, 1914, in favor of the Mississippi Valley Furniture Company, and returnable on the 15th day of December, 1914.

"Attachment No. 3, served through F. M. Guthrie, J. P., Memphis, Tenn., on the 5th day of December, 1914, in favor of the Ellet Rendall Shoe Company, returnable on the 15th day of December, 1914.

"Attachment No. 4, served through Jas. P. Cashin, J. P., Memphis, Tenn., on the 31st day of December, 1914, in favor of the Wm. R. Moore Dry Goods Company, and returnable on the 9th day of January, 1915.

"The claim of G. W. Butler and Marquette Cloak & Suit Company."

These answers were not traversed nor in any way contested at the term of court at which they were filed, but at the next term traverses thereof were filed in writing by appellee, in which he set forth the amount claimed by him to be due by each company to Mrs. Friedman; and the issue thus joined was submitted to a jury, which returned a verdict in each case for

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appellee in the sum claimed by him to be due from each company, and judgments were entered accordingly. Appellees were not aware of this proceeding until after the adjournment of the court.

Under the statute it is the duty of the garnishee to expressly admit or deny any indebtedness to the defendant in attachment or execution, as the case may be, and upon his failure so to do the plaintiff is entitled to a judgment by default unless the answer contains sufficient matter to entitle the garnishee to amend, in which event the plaintiff must except thereto, and if the exception should be sustained by the court, leave should be given to the garnishee to answer over, and upon his failure so to do judgment should be rendered against him by default for want of a sufficient answer. The answers of the Stuyvesant Insurance Company, Mechanics' & Trader's Insurance Company, National Fire Insurance Company, and Ætna Insurance Company simply amount to an allegation that they are unable to say whether or not they are indebted to Mrs. Friedman, but that in event they should afterwards ascertain that they are so indebted they will, with the permission of the court, file amended answers setting that fact forth. The proper course for appellee to have pursued with these answers was to have excepted thereto, which exception should have been sustained by the court and judgments for want of a sufficient answer awarded, unless appellants asked leave to amend, in which event they should have been permitted so to do, and if dissatisfied with the amended answers appellee could have then taken issue upon them and the causes should then have preceeded to trial thereon. It was not necessary for these exceptions to be filed at the same term at which the answers were filed, for the reason that the answers themselves requested permission to file amendments thereto at a later day, thereby continuing the cases in court until they should be disposed of in a proper manner.

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The answers of the German Fire Insurance Company and Globe & Rutger's Fire Insurance Company each admitted an indebtedness due by each of them to Mrs. Friedman, and the allegations therein that this indebtedness is subject to certain attachments is too vague and indefinite to raise an issue relative thereto, so that appellee was entitled to judgments on the answers for the amounts admitted to be due. Appellee lost the right, however. to contest these answers and obtain judgments for larger sums than those admitted to be due, for the reason that under section 2353, Code 1906, the answer of a garnishee must be contested during the term at which it is filed, or leave then obtained from the court to contest the same at a subsequent term. *Ice Co.* v. *Cook Wells Co.*, 71 Miss., 886, 16 So. 259; *Hattiesburg Trust & Banking Co.* v. *Hood,* 97 Miss. 340. 52 So. 790.

The judgments of the court below will be reversed, and the causes remanded to be proceeded with in accordance with this opinion.

Reversed and remanded.

ULMER v. PISTOLE.

[76 South. 522, Division A.]

1. MUNICIPAL CORPORATIONS. *Streets. Duties of automobile drivers.*
It is negligence for the driver of an automobile not to look in both directions when passing a street crossing.

2. JURY. *Drawing jury. Prejudice. Evidence. Sufficiency.*
Under the facts of this case the court held, that defendant was not prejudiced by the fact that the plaintiff's brother who was the clerk of the board of supervisors was present, and assisted in the drawing of the juries for the term.

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3. TRIAL. *Argument of counsel.*

The fact that the plaintiff's counsel in his closing argument to the jury spoke of defendants' instructions as "these little, old, trickey, catchy instructions given for the purpose of misleading an honest jury," while highly improper, was not reversible error.

4. JURY. *Verdict of nine jurors. Validity. Conclusiveness.*

A verdict in a civil case returned by nine jurors is valid and constitutional and the verdict cannot be impeached by any one of the twelve jurors on the jury.

5. DAMAGES. *Excessive damages.*

A verdict of ten thousand dollars to a husband for the injury, pain, suffering and death of his wife caused by an automobile collision was not excessive.

6. MUNICIPAL CORPORATIONS. *Streets. Speed of travel.*

The driving of an automobile at an unlawful and dangerous rate of speed, upon a frequently used street in a populous part of a city, is negligence *per se*.

7. MUNICIPAL CORPORATIONS. *Streets. Speed of travel.*

The operator of an automobile is entitled to the reasonable use and enjoyment of the streets and highways so long as he operates his car in a careful and lawful manner, but the negligent and reckless operator who drives his car at a dangerous or unlawful rate of speed in disregard of the rights and safety of others should be held to strict accountability both civilly and criminally for his wrongful conduct.

8. MUNICIPAL CORPORATIONS. *Street. Speed of travel.*

The same general law applicable to the use of all vehicles on public highways applies to automobiles, the substance of which is that a driver must use that degree of care and caution which an ordinarily prudent person would exercise under the same circumstances.

9. SAME.

The driver of an automobile must keep his machine constantly under control; he must continue on the alert for pedestrians and others using the streets, and must anticipate their presence; especially must he expect and look out for vehicles and persons at such places as street intersections and corners, shopping centers, and other familiar places by and through which the main currents of the population habitually pass. It is his duty to slow down at street intersections in order that possible accidents and collisions may be foreseen and averted.

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APPEAL from the circuit court of Lauderdale county.

HON. R. W. HEIDELBERG, Judge.

Suit by W. H. Pistole against J. V. Ulmer. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Jacobson & Brooks and *Baskin & Wilbourn,* for appellant.

C. B. Cameron, for appellee.

HOLDEN, J., delivered the opinion of the court.

The appellee recovered a judgment of ten thousand dollars against appellant J. V. Ulmer for the injury and death of his wife, Mrs. W. H. Pistole, who was injured by an automobile operated by appellant in the streets of Meridian. The injury was received in the following manner: Mrs. W. H. Pistole was riding in a single bugy with another lady, who was driving the horse, going east on Ninth street, when they came to the intersection of Twenty-Third avenue, which avenue runs north and south, and they had nearly crossed over Twenty-Third avenue on Ninth street when appellant Ulmer approached in his automobile from the south going north on the right-hand or east side of Twenty-Third avenue, and collided with the buggy, striking the right, rear wheel with great force and violence, throwing the two ladies to the pavement, turning the buggy and horse crosswise in Ninth street, and hurling the buggy cushion against a bystander on the sidewalk. Mrs. Pistole received a gash on the head, and was otherwise injured, from which injuries she finally died.

There was an arc light near, which lighted the scene of the collision. The automobile also had its lamps lighted. There was nothing to prevent appellant Ulmer from seeing the buggy as it approached and crossed Twenty-Third street in his pathway, if he had looked

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in that direction. The automobile was running at the rate of twenty or twenty-five miles per hour at the time it struck the buggy, and there was no warning given by horn or otherwise. The city ordinance provides that it shall be unlawful for automobiles to exceed a speed of eight miles per hour in the fire limits, and fifteen elsewhere in the city. Twenty-Third avenue and Ninth street at the point of the injury were frequently used by vehicles and pedestrians.

The testimony offered by appellant is in conflict in some particulars with the above facts proven by the appellee, but of course the verdict of the jury settles the dispute as to the facts in favor of appellee. The appellant in his testimony practically confesses negligence on his part. He testified that at the time of the collision he was not looking out for any person or vehicle that might come from the west going east across Twenty-Third avenue, but that he was looking only to his right for vehicles to come out of Ninth street going west. His failure to look in both directions was negligence.

In his appeal here the appellant assigns several errors in the trial below. We will discuss the assignments which appear to merit notice.

First. Appellant contends that the court erred in refusing to sustain the challenge and motion of defendant to quash the entire panel of jurors summoned to serve during the week of court in which this case was set for trial, on the ground that W. R. Pistole, a brother of appellee W. H. Pistole, was the chancery clerk of Lauderdale county, and was clerk of the board of supervisors, and as such assisted in selecting the list of jurors and in drawing the names from the box to serve as jurors at that term of court while this case was pending for trial therein. It is urged that:

"For sound reasons of public policy the appellant should not have been forced to bear any of the pos-

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sible consequences of the situation, even though no actual fraud was shown to have been committed."

This principle contended for by appellant is well established in the common law, and is based upon the old idea that a person should not be placed in a position where there will arise a conflict between interest and integrity; that the temptation to do wrong should not be afforded by opportunity for fraud. We do not dispute the soundness of this view, and in proper cases the application of this principle should be made, but the case before us does not come fairly within this rule. The record here discloses that the testimony taken on the hearing of the motion demonstrated clearly and conclusively that no fraud was committed in securing the jury under the directory terms of the statute providing the method of obtaining jurors. It appears that the chancery clerk did not as clerk of the board of supervisiors select the names placed in the jury box, but this was done by the members of the board of supervisors from their respective districts. In drawing the list of jurors from the box the clerk did not select the names, but drew them in a mechanical way; not having any discretion or knowledge as to what names would be drawn as jurors for the term of court. The undisputed proof in the record shows that the clerk did not in any way select or discriminate in the drawing of the jurors from the box. So it abundantly appears that no fraud was practiced, and that there was little or no opportunity for fraudulent conduct. Section 2716, Code 1906, provides that "a challenge to the array shall not be sustained, except for fraud." Under the particular facts here we cannot say there was fraud or even a well-grounded suspicion of it.

Second. The appellant complains that the court erred in granting certain instructions to the appellee, and refusing certain instructions asked for by appellant. We have carefully reviewed all of the instructions re

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fused and given to both sides, and, taking all of them together, we cannot say that the lower court committed reversible error in announcing the law governing the case.

Third. Appellant contends that the proof is not sufficient to show that the injury received by Mrs. Pistole was the cause of her death. There is no merit in this position, as a number of witnesses, including doctors, testified that the death resulted from the injuries received by her when struck by the automobile driven by appellant. The jury believed this testimony, which ends the dispute of fact.

Fourth. It is urged by appellant that a new trial should have been granted appellant on account of the language used by counsel for plaintiff in the closing argument before the jury. The attorney said to the jury in speaking of the defendant's instructions, "These little, old, tricky, catchy instructions, given for the purpose of misleading an honest jury." While the language is imporper, and might, under some circumstances, place the attorney in contempt of court, still we are unable to say that the improper remarks substantially damaged or prejudiced the case of appellant, and we will not reverse for this reason. But improper or unfair argument should have no place in courts of justice.

Fifth. The appellants assigns as error the verdict of nine jurors, as void and unconstitutional; that the verdict of ten thousand dollars is excessive; and that it was impeached by one of the jurors. As to these last contentions we hold that a verdict in civil cases returned by nine jurors is valid and constitutional, and the verdict cannot be impeached by any one of the twelve jurors on the jury. The verdict of ten thousand dollars for the injury, pain, suffering, and death is not excessive in this case, and we see no good reason for disturbing it.

Viewing the case as a whole, we do not think the appellant can justly complain at the result reached in

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the lower court. He was driving his automobile at an unlawful and dangerous rate of speed upon a frequently used street in a populous part of a city. This was negligence *per se*, approximately contributing to the injury, and in connection with his other negligent conduct may have amounted to gross negligence.

The operator of an automobile is entitled to the reasonable use and enjoyment of the streets and highways so long as he operates his car in a careful and lawful manner. But the negligent and reckless operator who drives his car at a dangerous or unlawful rate of speed in disregard of the rights and safety of others should be held to strict accountability, both civilly and criminally, for his wrongful conduct. With the advent of the motor vehicle the dangers of the crowded city streets have been greatly multiplied and augmented. The automobile was designed to meet the practical needs of many occupations and businesses, and also to furnish to those who could afford the expenditure a new and pleasant means of recreation. Its patent advantages over the horse-drawn vehicle, for purposes of both utility and pleasure, have resulted in its unqualified adoption, especially in our cities. Daily becoming more useful and desirable, its popularity has increased so rapidly during the past few years that manufacturers have been hard pressed to supply the enormous demand for their product. The buggy, the carriage, the cab, and the dray are no more. Where their familiar noises once added to the traffic's din, the purr and roar of the gasoline motor is heard amid the clamor of busy streets, and the loud, harsh noises of gutteral horns ring day and night in the ears of the city's thousands, at once a warning and threat to the hurring throngs. Employed for its legitimate purposes and used with due regard for the safety of others, the automobile is harmless and an altogether desirable means of conveyance. But there has devoloped of late a distinct tendency to its abuse. There seems to be a growing feeling of arrogance a-

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mong some owners and operators, an idea that the highways were built peculiarly for their use, and a disposition, therefore, to use them to the inconvenience and even to the peril, of others equally entitled to this privilege. This is not true of all, but only of a few in each community, whose defiance of law and disregard of human life has come to be appalling. Local speed laws and traffic regulations have notoriously failed to daunt these seeming speed maniacs, and it is indeed marvelous that more accidents do not result from their activities.

As for the law that governs the use of the highways and streets by drivers of cars, it is not difficult to define the principles to be applied with respect to such use. The same general law applicable to the use of all vehicles on public highways applies to automobiles, the substance of which is that a driver must use that degree of care and caution which an ordinarily prudent person would exercise under the same circumstances. But this is not all. Recognizing in the motor vehicle an instrumentality equally as dangerous in many respects as the locomotive and trolley car, the law exacts additional precautions from operators. The driver of an automobile must keep his machine constantly under control, he must continue on the alert for pedestrians and others using the streets, and must anticipate their presence. To assume that the way is clear is not his right. The fact that he was unaware of the presence of others in no way extenuates conduct which would have been wantonly reckless, had he known that another person or vehicle was crossing his pathway. Especially must he expect and look out for other vehicles and persons at such places as street intersections and corners, shopping centers, and other familiar places by and through which the main currents of the population habitually pass. It is his duty, and the great majority of city traffic regulations to prescribe, to slow down at street intersections, in order that possible accidents and collisions may be foreseen and averted. It has even been held that the fail-

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ure to see a pedestrian in the street amounted to negligence. The following authorities are here cited to sustain the above conclusions: 2 R. C. L. p. 1184; *Lauson* v. *Fond du Lac*, 141 Wis. 57, 123 N.W. 629, 135 Am. St. Rep. 30, 25 L. R. A. (N. S.) 40; 108 Am. St. Rep. 214, note; 4 Ann. Cas. 398, note; 13 Ann. Cas. 464, note; 1 L. R. A. (N. S.) 227, note; *State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; *Weil* v. *Kreutzer*, 134 Ky. 563, 121 S. W. 471, 24 L. R. A. (N. S.) 557, and note; *Minor* v. *Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214; *Minor* v. *Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, and note.

The courts of this state have not often been called upon to adjudicate controversies arising from the wrongful use of automobiles on the public highways. But the fund of judicial decision as contributed to by sister states during the last two or three years supplies an abundance of well-reasoned opinions and precedents which support fully the views set forth herein.

The judgment of the lower court is therefore affirmed.

Affirmed.

BROOM v. SOUTHERN RAILWAY IN MISSISSIPPI.

[76 South. 525, Division A.]

STATUTE OF LIMITATIONS. *New cause of action. Action for death. Computation of period. Amendments.*

Where a wife, as administratix of the estate of her deceased husband brought suit for his death within the two years allowed under the federal employer's liability act, and her declaration, though stating a cause of action under the state laws, did not bring her case under the operation of the federal act, an amendment of the declaration to bring the case within the federal employer's liability act (Act Cong., April 22, 1908, C. 149, 35 Stat.

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U. S. Comp. St. 1916, sections 8657-8665), by alleging that the injury resulting in the death of plaintiff's intestate occured while the parties were engaged in interstate commerce, instead of intrastate commerce, did not constitute a new cause of action, barring the suit under the limitations of two years and such amendment was properly allowed.

APPEAL from the circuit court of Lowndes county.

HON. T. B. CARROLL, Judge.

Suit by Mrs. Ida K. Broom against the Southern Railway in Mississippi. The court overrules plaintiff's demurrer to defendant's plea of the statute of limitations and plaintiff appeals.

The facts are fully stated in the opinion of the court.

James T. Harrison, for appellant.

Amendments: 25 Cyc., page 1305, "Amendment to Pleadings." "An amendment of a declaration, petition, or complaint which sets up no cause of action or claim and makes no new demand relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point." (The note, No. 61, relates to many U. S. authorities and to many state authorities). In fact this principle is recognized to such an extent that it has become elementary; to hold to the contrary would be to abolish section 775 of our Code and the numerous Supreme court decisions on that subject. Our law favors amendments to such an extent as to make them matters of right, for their purpose is a perfect pleading. Appellee takes the contrary view and says that they destroy them.

This principle is well set out in *Greenwood Grocery Co.* v. *Bennett et al.*, in *haec verba.* "The courts of law are organized for the purpose of trying causes on their merits, and only in exceptional cases should the trial court refuse to permit amendments of pleadings or preceedings." Yet, in this cause the amendment was

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invited into the temple of justice by suggestion of appellee, only to have it thrown out at the alter, as an intruder.

This amendment "set up no cause of action or claim and made no new demand." So it relates back to the commencement of the action.

In *Hardie* v. *Bulge*, 66 Miss. 577, 6 So. 186, the court says: "A different state of facts from these averred in the bill may be set up by way of amendment, if the character of the relief sought remains the same and this, notwithstanding the averments in the amendments are inconsistent with these of the original bill; provided they are not inconsistent with its purpose and the relief originally sought."

This goes much further than we ask for especially in view of the fact that appellee plead the objection that necessitated the amendment. In Corpus Juris, "A to Adult" page 1159 we find as follows: "In Federal Courts." The Federal courts will follow the practice of the state where the action is brought, in determining when the action is commenced (except with regard to suits in equity and in admiralty) and note "11" to this section of text 410 cites quite a number of authorities, several being federal. Section 413 on said page says: "Effect of Amendment." And amended declaration or complaint which does not introduce a new cause of action relates back to the original commencement of the action," (its note (20) cites quite a number of authorities, all federal) "and cannot be considered as the beginning of a new action as of the date of the amendment." (Note 21 cites quite a number of authorities, mostly federal.) This is sconclusive, for any other interpretation would be like the monkey "far fetched and full of nonsense."

Same authority says that "In Mississippi," "The action shall be considered to have been commenced at the time of the filing of the declaration if summons is issued thereon." (page 1158.)

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25 Cyc., page 1020, under action of tort says: "The rule in favor of the *lex fori*, in determining what law governs as to the limitations of actions, applies to actions for torts, as for instance, actions for damages for personal injuries." (Within a number of references in notes 80 & 71.)

This very case except as to name, etc., has recently been decided by the supreme court of Wisconsin in the cause of *F. E. Curtice, Appellant,* v. *Chicago & Northwestern Railway Company, Respondent,* Reported in L. R. A., 1916D., page 316.

The plaintiff sued it as an intrastate railway within the two years. Defendant plead interstate traffic; Plaintiff, amended in that respect. The two years had passed before amendment; defendant demurred, which was sustained by the lower court—all of whch happened in this case.

The supreme court of Wisconsin reversed it (as we hope for in this instance). The court said: "The point involved upon this appeal, under the assignments of error is whether the amended complaint set up a different cause of action than that stated in the original complaint. The contention of the appellant is that there is but one cause of action under the state law, and that under the federal act, while on the part of the respondent it is insisted that the original complaint set up a cause of action under the state law, and that the amendment changed it from a cause of action under the state law to one under the federal act. It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury was sustained, the parties were engaged in inter-state commerce. Nothing stated in the amended complaint was in conflict or inconsistant with the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover dam-

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ages was defectively stated in the original complaint, and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it; hence the statute of limitation was no defense to it, quoting from *Missouri, K & T. R. Co.* v. *Wulf,* 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. Pep. 135, Ann. Cas. 1914B, 104; *Gainsville Midland R. Co.* v. *Vandiver,* 141 Ga. 350, 80 S. E. 997; *Bixler* v. *Pennsylvania Co.* (D. C.), 201 Fed. 553, *Smith* v. *Atlantic Coast Line R. Co.,* 127 C. C. A. 311, 210 Fed. 761, *Cincinnati N. O. & T. P. R. Co.* v. *Goode,* 163 Ky. 60, 173 S. W. 229; *Vickery* v. *New Lenden Northern R. Co.,* 87 Conn. 634, 89 Atl. 277; *Schieffelin* v. *Whipple,* 10 Wis. 288 154 N. W. 449. And again, "There is another feature of this case which is worthy of notice. When the defendant answered the original complaint, it set up the facts which were omitted in the plaintiff's defective complaint and necessary to perfect the cause of action under the Federal act, and which were afterwards set up by plaintiff in the amendment complained of the defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed, and the complaint on the trial amended in accordance with the issues made by the pleadings as originally framed." *Callahan* v. *Chicago & N. W. R. Co.,* 161 Wis. 288, 154 N. W. 449; *Bieri* v. *Fonder,* 139 Wis. 150, 120 N. W. 862; *Gerber* v. *Duluth S. S. & A. R. Co.,* 159 Wis. 414, 150 N. W. 489; *Wabash R. Co.* v. *Hayes,* 234 U. S. 86, 58 L. Ed. 1226, 34 Supt. Ct. Pep. 729, 6 N. C. C. A. 224. As said in *Union O. R. Co.* v. *Wyler,* 158 U. S. at pp. 297, 298, 39 L. Ed. 990, 991, 15 Sup. Ct. Rep. 882: "The whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat, rights and justice." "We are convinced that the amendment did not introduce a new cause of action, but cured the defective cause of action originally

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pleaded; hence the amendment was proper." "The judgment is reversed, and the cause remanded for further proceedings according to law."

To show that the case above quoted and the one at bar are twins both as to law and fact, we quote the statement of the former to wit: "Among other things, the defendant set up facts showing that at the time of injury the plaintiff and defendant were engaged in intersate commerce, and that the cause of action, if any existed, was under the Federal act. (Act April 22, 1908, chap. 149, 35 Stat. at L. 65; U. S. Comp. Stat. 1913, 865-8655). Not under the law of the state of Wisconsin, judgment was demanded by defendant abating the action."

Afterwards the plaintiff was allowed to amend his complaint by adding allegations to the effect that defendant's road runs through the state of Michigan, and that plaintiff and defendant were at the time of the injury alleged, engaged in interstate commerce. Defendant then amended its answer, setting up the statute of limitations. At the time of the amendment of the complainant, two years from the time of the alleged injury had expired. The court below held that the original cause of action was one under the state law, and that the amendment of the complaint set up a cause of action under the federal act, and that such action was barred by the two-year statute, and sustained the defendant's demurrer and dismissed the complainant. The plaintiff appealed to this court from the judgment dismissing the complaint. This case was decided February 22, 1916, hence is the latest of which we have knowledge.

The supreme court of the United States made its latest deliverance on this subject in the case of *Missouir, Kansas & Texas Railway Company*, v. *Wolf*, Supreme Court Reporter (National Reporter System) 226-230, Vol. 33 pages 135-138 to wit: As the summary of H. D. Miner in his pamphlet, "The federal Employ-

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ers' Liability Act" reprinted from the Virginia Law Review for December, 1913, is to the point, we quote it. Where the action is commenced by a relative of the decedent in his individual capacity to recover under the state statute, but the facts stated show a case under the federal act, the court may, and ordinarily should, allow an amendment so as to substitute the personal representative of the decedent as plaintiff, and this may be done although the statutory period of two years may have elapsed since the death of the decedent. Such an amendent does not state a new cause of action. "This case is cited by him as to above. The court says (See page 137): "Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by section 6 of the Employers' Liability Act. The change was in form rather than in substance. (The case at bar does not even go that far). Citing *Stewart* v. *Baltimore & O. R. Co.,* 168 U. S. 445, 42 L. Ed. 537, 18 Sup. Ct. Rep. 105. It has introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action (neither does this) and therefore it related back to the beginning of the suit, citing, *Texas & P. R. Co.* v. *Cox,* 145 U. S. 593, 603, 36 L. Ed. 829, 832, 12 Sup. Ct. Rep. 905; *Atlantic & P. R. Co.* v. *Laird,* 164 U. S. 393, 395, 41 L. Ed. 485, 486, 17 Sup. Ct. Rep. 120; See also *McDonald* v. *Nebraska* 41 C. C. A. 278, 101 Fed. 171, 177, 178; *Patille* v. *Allen-West Commission Co.,* 65, C. C. A. 508, 131 Fed, 680; *Reardon* v. *Balaklala Counsel Cooper Co.,* 193 Fed. 189. Reliance is placed by plaintiff in error upon *Union P. R. Co.* v. *Wyler,* 158 U. S. 285, 39 L. Ed. 983, 15 Sup. Ct. Rep. 877," etc. *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 59, 69, 70, 57 L. Ed. 417, 421, 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C. 176; *Winfree* v. *Northern P. R. Co.,* 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. Rep. 273; *American R. Co.* v. *Dickerson,* 227 U. S. 145, 149, 57 L. Ed. 456. 457, 33 Sup. Ct. Rep. 350, 6 N. C. C. A. 436.

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The leading english case on the subject is *Murry* v. *East India Co.*, 5 Barn. & Ald. 204, 24 Revised Rep. 325, which has been very generally followed in this country. *Richard* v. *Maryland Ins. Co.*, 8 Cranch. 84, 3 L. Ed. 496; *Murry* v. *East India Co., Supra; Bucklin* v. *Ford,* 5 Barb. 393; *Cary* v. *Stephenson,* 2 Salk. 421; *Davis* v. *Garr,* 6 N. Y. 124, 55 Am. Dec. 387; *Levering* v. *Rittenhouse,* 4 Whart, 130, per NELSON, J.; *Wennman* v. *Mohawk Ins. Co.*, 13 Wend. 267, 28 Am. Dec 464; *Jelliffe* v. *Pitt,* 2 Vern. 694; *Douglas* v. *Forrest,* 4 Bing 686, 1 Moore 7, p. 663, 6 L. J. C. P. 157, 29 Rev. Rep. 695; *Benjamin* v. *Degroot,* 1 Denie 155; *Collier* v. *Goessling,* 87 C. C. A. 506, 160 Fed. 604, 611; *Fulenweider's case* 9 Ct. Cl. 403.

For other authorities considering the statute of limitations as applied to a contract right maturing after death see the following: *Andrews* v. *Hartford & N. H. R. Co.*, 34 Conn. 57; *Hobart* v. *Connecticut Turn. Co.*, 15 Conn. 145; *Ewell* v. *Chicago & N. W. R. Co.*, 29 Fed. 67; *Crape* v. *Syracuse.* 183 N. Y. 395. 76 N. E. 465; 19 Am. Neg. Rep. 429; *Barnes* v. *Brooklyn,* 22 App. Div. 520, 48 N. Y. Supp. 36; *Everitt* v. *Everitt,* 41 Barb. 393; *Dunning* v. *Ocean National Bank* 6 Lans. 297, 61 N. Y. 497, 503, 19 Am. Rep. 293; *Sanford* v. *Sanford.* 62 N. Y. 553, 555; *Halsey* v. *Reid,* 4 Hun. 778 and *Cohen* v. *Hymes,* 64 Hun. 56, 18 N. Y. Supp. 571, in *Louisville & N. R. Co.* v. *Sanders,* 86 Ky. 259, 5 S. W. 563.

Summary.

When we consider that the plaintiff was prevented from bringing suit by the fraud of defendant (which is not denied) and that they delayed pleas until it had to get into court by affidavit, and set up a state of facts that could not be known to plaintiff and thereby claimed the benefit of the federal act when it was only an intrastate railway, and set up the statute of limitations on a mere amendment (acknowledging, simply because it was a matter of record and therefore could not be denied,

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that the declaration was filed in time), and set the time of its beginning both from the time of injury and also death, thus absolutely ignoring the administration which the act it invoked made imperative for the bringing of the suit; we are reminded of a sign that hung over a blacksmiths' shop, which read thus: "All kinds of turning, twisting and screwing done here."

T. C. Catchings, for appellee.

Inasmuch as the question arises as to whether the amended declaration by which the plaintiff seeks to recover damages for the benefit of the widow and children of the decedent by virtue of the Employers' Liability Act, presents a different cause of action from that set out in the original declaration, which sought recovery based upon section 721 of the Mississippi Code of 1906, as amended by the Law of 1912, it may be well at the outset to ascertain the definition made by the authorities of the term "cause of action."

In 1 Cyc., 543, it is said: "Nor is the term, cause of action, to be confounded with the terminology relating to the remedy, such as 'suit,' 'action,' 'cause,' and the like. The cause of action is the right to be enforced or the injury to be redressed; the action or remedy is the means which the law has provided whereby such enforcement or redress may be effected." 5 Am. & Eng. Ency. of Law, 776; *Read* v. *Brown*, 22 Q. B. Div. 128; *Hutchinson* v. *Ainsworth*, 73 Cal. 452, 15 Pac. 82; *Togers* v. *Association*, 17 S. C. 406.

It is shown by the original declaration that the railway company and decedent were engaged in intrastate commerce, and damages were claimed, compensatory and punitive, for the wrongful killing of the decedent by the gross, willful and wanton negligence of the said defendant railroad corporation.

Inasmuch as punitive damages are not allowable under the federal Employers' Liability act, this allegation in

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connection with that, that the railway company and decedent were engaged in intrastate commerce when the latter lost his life, make it clear beyond question that the purpose was to enforce a cause of action created by the law of the state of Mississippi.

If the suit had gone to trial upon this declaration, in order to entitle the plaintiff to recover, it would have been essential to show that the railway company and the decedent were engaged in intrastate commerce, inasmuch as the Law of 1912 only creates a cause of action for wrongful death, resulting from negligence in the conduct of intrastate commerce. If the suit had gone to trial under the original declaration, and if the proof had shown that the death was caused by gross and willful negligence, recovery might also have been had for punitive damages in addition to compensatory damages.

And in estimating compensatory damages under the Mississippi statute the plaintiff would have been entitled to recover in addition to pecuniary damages suffered by the beneficiaries, whatever sum the decedent might have recovered as the present value of his own expectancy. *Telephone, etc., Co.* v. *Anderson,* 89 Miss. 744.

The declaration, as amended, based the claim for recovery upon the federal Employers' Liability Act, and accordingly alleged that the decedent and the railway company were engaged in interstate commerce when the wrong was inflicted. The cause of action created by the Employers' Liability Act is very different from that created by the Mississippi statute.

Thus it will be seen that the cause of action set out in the original declaration is entirely different from that set out in the amended declaration.

It was essential to maintain the amended declaration to prove that the decedent and the railroad company were engaged in interstate commerce when the wrong was inflicted, which resulted in the death of the decedent. No such proof was required to be made to support the original declaration.

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The cause of action under both statutes is different from the right of action of the remedy provided by them whereby such enforcement or redress might be effected. The cause of action under both statutes included, as stated in the authorities above cited, every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.

The opinion of the supreme court in *U. Pac. R. Co.* v. *Wyler,* 158 U. S. 285, is illuminating upon this point. The original declaration, propounded a cause of action created by the statute law of Mississippi.

The amended declaration propounded a cause of action created by the Employers' Liability Act. Thus we have a clear departure from law to law. The cause of action propounded in the amended declaration is entirely new and distinct from that propounded in the original declaration. That the facts set out in the original declaration and those set out in the amended declaration may be the same does not affect the question, because there still remains a departure as the supreme court defines, it, "from law to law." The amendment to the declaration cannot relate back to the filing of the original declaration. This is made clear by the opinion of the supreme court which has been so freely quoted. It is there expressly declared that where the cause of action relied upon in the amendment is different from that originally asserted, the reason of the rule that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby, does not apply.

The case of *Missouri, Kansas & Texas R. Co.* v. *Sallie C. Wulf,* 226 U. S. 570, cited by counsel does not conflict at all with the Wyle case, and is no authority for the contention that the amendment to the declaration did not present a new cause of action, and that it, therefore, re-

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lated back to the filing of the original declaration and so eliminated the bar of the two-year statute.

That the cause of action pleaded as the result of the amendment was different from that pleaded in the original declaration is made plain by the language of the supreme court in *St. L., S. F.. & T. R. Co.* v. *Seale*, 229 U. S. 156. After a full statement of the proceedings which lead up to the trial, the court said:

"When the evidence was adduced it developed that the real cause was not controlled by the state statute but by the federal statute. In short, the case pleaded was not proved and the case proved was not pleaded."

The case of *U. P. R. Co.* v. *Wyler*, above referred to, was discussed with approval in *Hall* v. *L. & N. R. Co.*, 157 Fed. 464; *Howard* v. *Ill. Cent. R. Co.*, 270 U. S. 25, L. Ed. 306; *A. K. & N. R. Co.* v. *Hooper*, 92 Fed. 820; *Whalen* v. *Gordon*, 95 Fed. 305; *St. L. & S. F. R. Co.* v. *Loughmiller*, 193 Fed. 697; *U. Pac. R. Co.* v. *Wyler*, 158 U. S. 293; *Lilly* v. *Charlotte C. & A. R. Co.* (S. C.), 10 S. E. 932; *C. B. & L. R. Co.* v. *Jones*, 37 N. E. 258; *Eylenfeldt* v. *Illinois Steel Co.* (Ill.), 46 N. E. 267; *Allen* v. *Tuscorora Valley R. Co.*, 78 Atl. 34; *Curtice* v. *Chicago & N. W. R. Co.* (Wis.), 156 N. W. 484.

The next question presented in the case at bar is as to when the right of action accrued. That is to say, did it accrue only when the administrator was appointed? If it accrued upon the death of the decedent, the right of action was clearly barred.

This necessarily involves a construction of the Employers' Liability Act, in so far as it provides that such a suit as the case at bar shall be brought within two years from the day the cause of action accrued. This is the language of the statute: "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

In considering this question the following excerpt from the opinion in the case of *Atlantic Coast Line R. Co.* v. *Burnett*, 239 U. S. 199, 60 L. Ed. 227, is applicable:

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"In dealing with the enactments of a paramount authority such as Congress has within its sphere, over the state, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

The language was used in holding that an action in a state court founded upon the Employers' Liability Act must fail where the record shows that it was not begun until the time had elapsed after which no action could be maintained, although defendant did not raise the objection in his pleadings.

In considering this question it must be borne in mind that the liability and the remedy under the Employers' Liability Act being created by the same statute, the limitation of the remedy is necessarily, a limitation of the right. *Vaught* v. *Va. & S. W. R. Co.* (Tenn.), 179 S. W. 314; *Rodman* v. *Mo. Pac. R. Co.* (Kan.), 70 Pac. 642; *Morrison* v. *B. & O. R. Co.*, 40 App. (D. C.), 391; Tiffany on Death by Wrongful Act, sec. 121; Thornton on Federal Liability & Safety Appliance Act, (2 Ed.), sec. 114; 8 Am. & Eng Ency. 875.

There are many cases holding that in cases of death by wrongful act, the right of action accrues upon death, a few of which will be indicated: *Carden* v. *L. & N. R. Co.* (Ky.), 30 S. W. 1027; *C. & O. R. Co.* v. *Kelly's Admr.* (Ky.), 48 S. W. —; *Van Vactor's Admr.* v. *L. & N.* (Kv.), 66 S. W. —; *Louisville, Evansville & St. L. R. Co.* v. *Geo. Clarke, Executor of Augustine Clark, Deceased*, 152 U. S. 230, 38; L. Ed. 422; *Havana* v. *Jeffersonville R. Co.*, 32 Ind. 113; *Tynan* v. *Walker* (Cal.). 95 Am. Dec. 159; *Best* v. *Town of Kinston* (N. C.), 10 S. E. 997; *Lindsay* v. *Chicago, R. I. & P. R. Co.* (Okla.), 155 Pac. 1173; *Winfree* v. *N. Pac. R. Co.*, 173 Fed. 67; *Partee* v. *St. L. & S. F. R. Co.*, 204 Fed. 970; *Bixler* v. *Pac. R. Co.*, 201 Fed. 553.

It is respectfully submitted that the overwhelming weight of judicial opinion is to the effect that the amendment of the declaration set up a different cause of action, and that the amendment did not relate back to the filing

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of the original declaration so as to arrest the limitation prescribed by statute.

Also that in case of wrongful death, a right of action, under the Employers' Liability Act, accrues when the death occures and not upon the appointment of the administrator.

The ruling of the learned judge it is submitted, was entirely correct, and the judgment below should be affirmed.

HOLDEN, J., deivered the opinion of the court.

On June 19, 1915, the appellant, Mrs. Ida K. Broom, as administratrix of the estate of her deceased husband, John W. Broom, instituted suit against the appellee railway company in the circuit court of Lowndes county on behalf of herself, as widow and for the surviving children, who were named in the declaration. The declaration states a cause of action under the state law. Acts 1914, page 281. The declaration complains that the husband of appellant was an engineer in the employ of the appellee railway company, and while on duty was injured through the negligence of a fellow servant, from which injury he died. It also states that the appellee railway company is an intrastate railroad, and proceeds upon the theory of recovery of damages under the state law. It appears that the injury to the deceased engineer occurred in June, 1913, and he died in August, 1913. On September 16, 1915, the appellee railway company gave notice that it would prove that at the time of his injury Mr. Broom was an employee of the railway company and was engaged in interstate commerce. Following this notice, on September 20, 1915, the appellant by leave of court amended her declaration by alleging that, at the time Mr. Broom received the injury which resulted in his death, he and the appellee railway company were engaged in interstate commerce. To this amended declaration the appellee railway company pleaded the statute of

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limitations of two years under the federal act, to which plea the appellant demurred, and when the court overruled the demurrer, the appellant declined to plead further, and prosecuted this appeal here.

The only question presented for our review and decision is whether the cause of action under the amended declaration was barred by the two-year statute of limitations under the federal Employers' Liability Act. It will be observed here that the only amendment made to the original declaration was the allegation that the injury occurred while the parties were engaged in interstate commerce, instead of intrastate commerce. This amendment did not present a new or different statement of facts upon which the action was based, but merely amended the declaration, so as to come within the operation of the federal Employers' Liability Act, instead of the state law. The allegations contained in the original declaration did not support a cause of action under the federal law, but the amendment is not inconsistent with the purpose and relief originally sought by the declaration. It appears, therefore, that the amendment did not constitute a new cause of action, inconsistent with that set forth in the original declaration. The amendment was properly allowed by the lower court. It was not the beginning of a new action; but the suit should be treated as having been commenced at the time of the filing of the original declaration, which was done within the two years allowed in such cases. The demurrer to the plea of statute of limitation filed by the appellee in the lower court should have been sustained; and for this error the judgment of the lower court is reversed and the case remanded. *Curtice* v. *Railway Co.*, 162 Wis. 421, 156 N. W. 484, 1916D, p. 316; *M., K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134.

Reversed and remanded.

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SYKES v. MOORE, ET AL.

[76 South. 538, Division B.]

1. BILLS AND NOTES. *Want of consideration. Void.*
Where a husband dying left no estate, a promissory note by his widow in settlement of his debt was without consideration and void.

2. BILLS AND NOTES. *Validity. Fraud. Mistake.*
Where the widow of a deceased member of a lodge upon whose life she held a policy was induced by the collector and treasurer of the lodge to give him a note and assignment of an interest in the policy to pay the debt of the deceased husband to him, by representing to her that she could not collect the policy unless she executed such note and assignment, and the husband had left no estate, in such case the note and assignment was without consideration, and could not be enforced.

3. SAME.
A debt of a deceased husband is not a sufficient consideration for a note executed by his widow unless she receives assets from the estate.

APPEAL from the chancery court of Monroe county.

HON. A. J. MCINTYRE, Chancellor.

Bill by T. B. Sykes against Katie Moore and the Odd Fellows Benefit Association. From a decree for defendants, plaintiff appeals.

Appellant, as complainant below, filed his bill of complaint against Katie Moore, the widow of Dock Moore, deceased, and against the Odd Fellows' Benefit Association, a negro benevolent insurance order, in which Dock Moore, deceased, was insured in a sum not exceeding one thousand dollars. The suit is based upon a promissory note executed by Katie Moore in favor of T. B. Sykes, the complainant, after the death of Dock Moore, and upon an instrument of writing assigning to the complainant a partial interest in the proceeds of a policy or certificate

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of insurance which had been issued upon the life of Dock Moore, and in which the widow, Katie Moore, was beneficiary. The complainant, a colored merchant, claimed an indebtedness evidenced by open account against Dock Moore, the deceased husband of the defendant Katie, and to collect this indebtedness he induced the said defendant to execute to him the promissory note in the sum of two hundred and fifty dollars and to assign to him to that extent an interest in the exempt insurance. It appears that at the time Dock Moore died appellant was the local treasurer and collector of the local lodge of the defendant insurance company, and one of the defenses presented by the answer to the bill is the allegation that the complainant represented to Katie Moore that her husband was nonfinancial in the lodge, and that she, the defendant, would be unable to collect anything on the policy unless she would give to appellant an interest in the proceeds; that the complainant enjoined upon her the necessity of concealing the policy, and of leaving the details of collecting the insurance to him. It is further contented that Dock Moore died without leaving any estate, that the insurance was the exempt property of the widow, and that the execution of the note and the assignment of an interest in this insurance were without consideration and void. The chancellor, upon proof, dismissed the bill, and from his final decree appellant prosecutes this appeal. The chancellor rendered an opinion holding that the assignment and note were given by the appellee Katie Moore for the debt of her deceased husband, and under the facts the note and assignment were void for want of consideration. Appellant denied the charge of fraud, and introduced testimony tendng to prove that the note was executed by the widow voluntarily before a justice of the peace, who assisted the parties in preparing the papers. Inasmuch as the decision of this case turns upon a law point, it is unnecessary to detail the evidence for and against the charges of fraud.

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W. H. Clifton, for appellant.

Paine & Paine, for appellees.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). Under the facts, we concur in the opinion of the chancellor that the note sued on is without consideration and void. Katie Moore, the widow, was interrogated as to what, if any, property her husband left, and her response to the question was, "A wife and some children." The proof shows that the insurance would not exceed five hundred dollars. In such case, then, the note executed by the widow in an attempted settlement of her husband's debt is without consideration; certainly so, if the creditor is not thereby led to surrender his claim against the deceased. The best authorities, in our judgment, hold that a debt of a deceased husband is not a sufficient consideration for a note executed by the widow, unless she receive assets from the estate. 8 C. J. p. 222, with cases under footnote 12. In the present case there was no property left by Dock Moore subject to the demands of his creditors. There is no contention that the widow in any wise helped to incur the debt, and there was neither moral nor legal obligation resting upon her in the premises. On the point whether a moral or ethical obligation will supply the needed consideration in a contract of this character, the authorities are in conflict, and on this question we need not discuss the previous announcements or the position of this court. In the present case, we take it, there was no moral obligation upon the widow. The effort here is to subject the proceeds of insurance, which the statute and the public policy of our state proclaim exempt. The equities, then, are more in favor of the widow.

In the case of *Hanway* v. *Robertshaw et ux.,* 49 Miss. 758, the widow of one of the deceased partners of the firm of Bartholomew Hanway & Co. joined the surviving

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partner in executing notes for a debt of the said firm. It appears that there were personal assets of the partnership left in the hands of the surviving partner. In addition to executing a note for the partnership debt, the widow executed a mortgage on certain real estate belonging to the firm. There was in that case a bill for a foreclosure of the mortgage and upon contest our court held that:

"The widow of the deceased was not a member of the firm of Bartholomew Hanway & Co., and as the record does not show any consideration for her assumption of one-half of the debt of said firm, it is difficult to perceive upon what principle she can be liable to the appellant for any part of his claim against the said firm."

There was a second appeal of this case, as shown by the opinion in 52 Miss. 713, and the views expressed were reaffirmed.

In *Tucker* v. *Denton*, 32 Ky. Law Rep. 521, 106 S. W. 280, 15 L. R. A. (N. S.) 289, a daughter paid over certain money to secure the release of her parents from what she by mistake supposed to be an enforceable contract for the sale of real estate. Thereafter the daughter sued to recover the money, alleging a mistake of fact. The court reached the conclusion that the contract entered into by the parents, while not void, was unenforceable, held that the money was paid under mistake, and permitted the daughter to recover. It is difficult to know the importance the chancellor attached to the testimony to the effect that appellant represented to the widow that she would never collect her insurance unless satisfactory arrangements were made with him. At the time the note was executed, appellant was the local collector of the lodge, and by virtue of his position may have exercised an undue influence on Katie Moore and, if so, the doctrine of the Kentucky court would here be applicable.

It might be contended that the cases of *Bissinger* v. *Lawson*, 57 Miss. 36, and *Calhoun* v. *Calhoun*, 37 Miss. 668, though not cited by counsel, are in conflict with our pres-

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ent holding. Our examination of these cases, as reported, convinces us that the court adhered to the general and sound rule that the consideration for a contract of this character may be the full extinguishment of the debt held against the deceased. In the first-named case the deceased father owed a valid and subsisting indebtedness, which the son. a distributee of his estate, extinguished by his own personal obligation. The report does not show the condition of the father's estate; that is, whether solvent or insolvent, and what, if any, property the son received from the estate. The inference is that the son was a distributee and that he derived some benefit from the estate. The report further indicates that the obligation which the creditor there held against the deceased father was fully receipted and delivered up to the son. The same principle appears to govern the case of *Calhoun* v. *Calhoun*. If there were any forbearance or release by the creditor, the case would be different. The present record does not affirmatively show that appellant even receipted his open account against the deceased, or executed any kind of acquittance, and we assume that he did not change his position to his hurt or injury. Aside from these considerations, however, we are impressed with the want of consideration in this case. The widow did not owe the obligation she attempted to assume. She received no estate which by law would descend to the administrator for the benefit of creditors. There was, then, neither benefit to the widow nor any substantial forbearance by the creditor.

Affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* BUNCH.

[South. 540, Division B.]

1. JUDGMENT. *Res judicata. Evidence.*

To sustain a plea of *res adjudicata*, the evidence must show that the cause of action is the same.

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2. JUDGMENT. *Res judicata. Health insurance. Disability.*
The fact that plaintiff brought a suit on a health insurance policy for permanent total disability in which it was determined that he was not totally disabled, did not preclude him thereafter from instituting another suit upon the policy whenever the condition of permanent and total disability did exist and could be proven; although the infirmities proven in the second trial were the same as in the first except that they had grown worse.

3. INSURANCE. *Total disability.*
The fact that insured resigned his office of justice of the peace should not discount his claim of permanent and total disability or impeach his testimony. If his physical condition was such that he could not perform, in the main, the duties imposed by law, then he was not only justified in resigning but it was his duty so to do.

4. INSURANCE. *Health insurance. Policy. Construction.*
Under an insurance policy, giving half the total insurance for the loss of an eye with the option "to continue this covenant in force, till death" when the other half will be paid, where insured collected one-half of the policy for the loss of an eye, this did not convert the remainder, into an ordinary life policy, and prevent recovery for further accidents, since the clauses of the policy conferring the right of recovery for the loss of an eye and the right to recover for total disability constitute separate and valuable provisions, and rights and contracts of this character should be construed most strongly against the company and in favor of the insured.

5. ACCIDENT INSURANCE. *Partial disability. Later permanent disability.*
Under an accident insurance policy providing for indemnity for partial and total disability, where insured received indemnity for the loss of an eye and broken leg, he may still recover for permanent total disability, although the lost eye and broken leg contribute to the perment total disability.

6. INSURANCE. *Policies and by-laws. Which prevail.*
If there is a conflict between an insurance policy and the by-laws of the association, and the policy as issued is within the power of the association under its charter of articles of organization, the policy must prevail.

7. INSURANCE. *Accident insurance. Permanent disability.*
An insured is entitled to recovery under an accident insurance policy providing for indemnity for permanent disability where he is shown to be old, practically blind, a paralytic and cripple.

APPEAL from the circuit court of Yazoo county.
HON. W. H. POTTER, Judge.

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Statement of the case. [115 Miss.

Suit by J. D. Bunch against the Eminent Household of Columbian Woodmen. From a judgment for plaintiff, defendant appeals.

Appellant, a fraternal insurance company, prosecutes this appeal from a judgment rendered by the circuit court of Yazoo county in favor of J. D. Bunch, appellee, in the sum of two thousand three hundred dollars. The action was based upon a combination life, health, and accident insurance policy or "covenant" issued April, 1906, the value of which accumulated in accordance with its age, but in this case conceded to give appellee protection in the total sum of five thousand dollars. The covenant contains several provisions insuring the "guest," as the member is denominated, against accident and permanent disability, the more important provisions being as follows:

"On satisfactory proof of total and permanent disability at any age, this guest shall have the option to receive the value of this covenant at the time of such disability, in one sum, or in five, or in ten, equal annual installments. Old age shall be cause of disability after seventy.

"In event of loss of one hand, one foot or one eye, this guest shall have the option to accept one-half the value of this covenant at the time of such loss, in one sum or in five equal annual installments, and shall further have the option to continue this covenant in force till death, in which case the additional half of the same will be paid with its further accumulation.

"In event of broken arm or broken leg after this covenant has accumulated its full denomination, this guest shall receive two hundred dollars, or at an earlier date, the same percentage of the value of the covenant as this sum would be of its full cumulative denomination."

Mr. Bunch, a farmer by occupation, appears to have been in good health at the time the policy was issued to him and paid all premiums and assessments required, but beginning in the year 1910 he became the subject of

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a series of misfortunes and illness. According to the proof, in the year 1910 he suffered a stroke of paralysis, and from the effects of this he partially recovered, and for this he made no claim under his policy. In 1912 he fell and stuck a hay wire in his left eye, and from this accident he lost the use of his left eye, and in fact the eyeball had to be removed. For this injury appellee, under the terms of his policy, collected two thousand five hundred dollars, or one-half, in one sum. Soon after the injury to the eye, appellee broke his left arm near the wrist, and subsequently was thrown from his horse and had his right hip fractured. Mr. Bunch claims that his physician advised that he would recover, and for this reason he put in a claim for a broken leg and received under his policy two hundred dollars therefor. In September, 1915, appellee instituted a suit in the circuit court claiming permanent disability under the terms of his covenant and asked judgment on the policy for the balance of two thousand three hundred dollars. Issue was joined in this case, and upon trial of the cause in November, 1915, there was a peremptory instruction in favor of the defendant based largely upon the theory that plaintiff at that time was holding the office of justice of the peace and able to attend at least to a part of the duties of his office. Judgment was entered for the defendant in said suit, but in March, 1916, plaintiff, having resigned his office of justice of the peace, instituted another action against appellant, claiming total and permanent disability, and this action is the one now before the court. A demurrer to the declaration was overruled, and thereupon the defendant interposed the plea of *res adjudicata,* in addition to other pleas denying liability. Upon the trial of this second suit the evidence for the plaintiff stands undisputed. The defendant introduced the record of the first trial upon the issue of *res adjudicata* and earnestly contends that the present action is barred. There was a verdict and judgment in favor of the plaintiff, from which this appeal is prosecuted. The first assignment challenges

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the court's action in overruling the demurrer to plaintiff's declaration and presents for interpretation the covenant sued on. Counsel for appellant construe the clause in reference to the loss of an eye as meaning that the insured would have the option to accept two thousand five hundred dollars cash and end the contract absolutely, or he may continue the contract in the interest of his family for the full value of his policy, or he may accept one-half the amount of the policy and elect to continue the contract for a like sum for the protection of his family, but in this latter event he is required to continue the policy "until death." Counsel for appellee challenge this construction of the covenant sued on and contend that the payment of two thousand five hundred dollars for the loss of an eye merely reduced the accumulated value of the covenant, and when plaintiff elected to continue the policy in force until his death the contract was kept alive in all of its terms and provisions, and accordingly the other important provisions of the policy, including the insurance for total disability, could be relied upon.

It is also contended by counsel for appellant that the plea of *res adjudicata* should have been sustained. It is further contended that under the by-laws in force at the time the policy was issued the plaintiff could only recover one-tenth of the amount sued on because payment must be in ten equal annual installments. The by-law relied upon seems to be the following:

"On satisfactory proof of total and permanent disability at any age, this guest shall receive the value of this covenant at the time of such disability in ten equal annual installments."

The point is also made that because the condition of total disability resulted from injuries for which the appellant had discharged its liability by payment, no recovery could now be had for these resultant, permanent injuries.

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Campbell & Campbell, E. L. Brown and *J. A. Teat,* for appellant.

Holmes & Holmes and *Barbour & Henry,* for appellee.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). The strongest point made for appellant on this appeal is presented on the plea of *res adjudicata.* The first action was upon the same policy of insurance and between the same parties. To sustain this plea, however, the testimony must show that the cause of action is the same .

In the former suit plaintiff alleges as his cause of action total and permanent disability at the time the declaration was filed. In the present suit plaintiff relies upon total and permanent disability at a later period. It appears that plaintiff relied in his first action upon total disability existing in April, 1915. In the second suit, the present action, the disability relied upon is said to have existed in December, 1915. The judgment entered by the trial court in the first suit certifies conclusively that plaintiff at that time was not totally and permanently disabled. There was no appeal from that judgment, and the parties are, of course, bound by it. But if there was no total and permanent disability at the time the first declaration was filed, this fact, conclusively adjudicated by the court, did not preclude the plaintiff from thereafter instituting a suit upon his covenant whenever the condition of permanent and total disability did exist and could be proven. The evidence upon the second trial is not contradicted, and this evidence by the verdict of the jury shows that the plaintiff at that time was totally and permanently disabled. It is true that the testimony in the second trial is strikingly similar to that offered upon the first trial. The plaintiff, when upon the witness stand each time, was required to detail the history of his troubles and to describe his pain and weaknesses. We have ex-

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amined and compared the testimony of the plaintiff upon the two occasions. Plaintiff, upon the second trial, does not rely upon a new accident or pronounced injury, but he does state in a general way that the use of his right eye, through sympathy and strain, was growing worse all the time, and that he could not see very well. He states in a general way that the result of his former paralysis and the lingering effects of his several injuries were aggravated by time and age, and that his condition when testifying the second time was "worse" than it had been; that on account of being unable to attend to the duties of justice of the peace, he resigned the office and another was elected in his place. Counsel lay much emphasis upon the fact that Mr. Bunch filled the ancient and honorable office of justice of the peace and voluntarily resigned his office. The proof on the first trial showed that Mr. Bunch could not then perform and attend to all the duties of a justice of the peace, but only took affidavits and made suits returnable before another justice.

The fact that the plaintiff resigned this office, in our judgment, should not discount his claim or impeach his testimony. If his physical condition was such that he could not perform in the main the duties imposed by law, then he was not only justified in resigning, but it was his duty so to do. With the little emoluments of this office cut off, plaintiff was left absolutely without an occupation, trade, or profession. He could do no farm labor, and according to the proof, he could not earn a livlihood at any kind of work, physical, mental, or clerical. Unfortunately he is a man of limited education, with no previous experience in doing clerical work. The proof on the second trial in this regard seems stronger than that taken upon the first trial. Without, then, entering further into the details of the testimony, we feel justified in concluding that the plea of *res adjudicata* was not an absolute bar to a recovery in the present suit.

There is no merit in the contention that the plaintiff has no cause of action because he collected one-half

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of the policy for the loss of an eye. The clauses of the policy conferring this right of recovery for the loss of an eye and the right to recover for total disability constitute separate and valuable provisions and rights. The policy should not be so construed as to nullify one of these clauses simply because plaintiff relied upon the other. Upon the argument of counsel for appellant, when plaintiff collected for the loss of one eye the policy ceased to be an accident and health policy, but became merely a a life insurance policy. It is elementary that contracts of this character should be construed most strongly against the company and in favor of the insured.

Closely connected with this argument is the additional contention that the total disability here relied upon is the result of injuries for which plaintiff had been paid and for which he has executed to the company a full acquittance. There is no merit in this contention. The several injuries for which plaintiff was paid, and which are covered by the express terms of the policy, conspire with the other weaknesses of the plaintiff in producing the total disability, and so it is that the result here complained of is the concurrence of those things covered and those which are not covered by the policy. As an illustration, the total loss of the left eye gave the plaintiff the right to recover one-half of the policy, and for this he was fully paid. The loss of this eve, however, is a contributing cause in producing total disability. A similar question was before the court in the case of *Anderson* v. *Ætna Life Ins. Co.*, 75 N. H. 375, 74 Atl. 1051. The court in that case, interpreting a policy similar to the one here sued on, reached the conclusion that the payment of the amount agreed upon for the accidental loss of a limb did not release the company from its agreement to pay the stipulated indemnity in event of total disability. Likewise in the case of *Hart* v. *Accident Association*, 105 Iowa, 717, 75 N. W. 508, the result reached by the court on this point is well stated by the syllabus as follows:

"The weekly indemnity for loss of time and the indemnity for loss of a foot provided in a certificate of

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accident insurance may both be recovered, although they result from the same accident, if the total indemnity does not exceed the limit fixed by the terms of the contract."

Any other construction would destroy the value of the present covenant. A contrary view would lead to the position that the happening of an accident which matures a small indemnity would take away the insured's right to a much greater indemnity which would ultimately accrue to the plaintff but for the happening of the lesser injury and payment therefor. The contract does not so provide. Its very purpose was to indemnify the insured for more possible losses than one, in no event to exceed the full amount of five thousand dollars. This untenable position needs no further discussion.

Is the covenant issued to Mr. Bunch and providing for payment "in one sum" to prevail over the by-law which provides for payment "in ten equal annual installments"? In our opinion the policy must prevail. If there is a conflict between the policy and the by-law and the policy as issued is within the power of the association under its charter or articles of organization, the policy must prevail. *McCoy* v. *Northwestern Mutual Relief Association,* 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681, and the authorities cited in the footnote. There is material difference in the financial worth of a policy, the proceeds of which are to be paid in one lump sum, and a policy which is to be paid in ten equal annual installments. The difference in value between the two contracts needs no demonstration. In the present case the covenant was issued by the "Eminent Household." the supreme authority. Under the plan and general purposes of the appellant organization it could hardly be said that the policy as issued was beyond the power of the society. The contract then as issued and accepted should be binding upon the company. It is conceded that there is here no demand above the maximum amount stipulated for in the policy. The plaintiff has duly credited the partial

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payments for the loss of his eye and the fracture of his leg, and now sues for the difference.

According to the undisputed proof, Mr. Bunch is now in advancing years and finds himself practically blind, a paralytic, and a cripple, and we believe the proof shows that he has brought himself squarely within the terms of his contract, and we see no reason to disturb the judgment of the learned circuit court.

Affirmed.

Board of Supervisors of Grenada County v. King.

[76 South. 543, Division B.]

Clerks of Courts. *Compensation. Copy of tax assessments.*

Under Code 1906, section 2175, declaring that the board of supervisors may allow the clerk reasonable compensation for making copies of assessment rolls, not to exceed one cent for each separate assessment of lands per copy but the board may allow as much as fifty dollars in any case for copying the personal roll and under section 4384, requiring the state Railroads Commissioners to assess property of railroads, telegraph, telephones, sleeping car and express companies and section 4387, providing that in each year the commission shall make out for each county having any such property an assessment roll of such property therein and assess both real and personal property, and that the form of such assessment shall be transmitted to the clerk and under section 4390 requiring the clerk to make copies but making no provisions for compensation, the clerk's compensation is governed by section 2175, and in a suit by the board of superivisors against its clerk for over payments made him for such service, the board cannot recover unless it specifies in its declaration what companies were assessed in the county by the railroad commission and the number of such assessments and the amount that was properly allowed the clerk.

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APPEAL from the chancery court of Grenada county. HON. J. G. McGOWEN, Chancellor.

Suit by the Board of Supervisors of Grenanda County against John S. King. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

W. M. Mitchel, for appellant.

The questions presented by this record are, first, did the board of supervisors have any authority of law for allowing its clerk compensation (other than and besides that authorized to be allowed for *ex officio* service under paragraph (Z) of section 4390, Code 1906, not exceeding two hundred dollars per annum for services not specifically provided for); and second, if so, did they exceed their authority in making the allowances complained of in appellants' bill? For if they had no such authority, or, if, having it, they exceeded the limits fixed by law, then it is well settled that the county can recover this amount so illegally allowed by former boards of supervisors.. *Supervisors* v. *Klein,* 51 Miss. 816; *Jefferson Co.* v. *Grafton,* 74 Miss. ——.

If the allowances made to appellee were authorized at all by section 2175, Code 190, which we deny, it certainly did not authorize the amounts allowed by the boards to appellants in this instance for making the copies of the railroad assessment rolls, since this section limits the amounts to be allowed to "one cent for each personal assessment or (and) two cents for each separate assessments of lands per copy;" and hence the chancellor should have referred the case to a master to take and state an account and determine the true amount due the clerk for making these railroad assessment rolls, since it was charged in the bill and not denied that the amounts allowed him were greater than was authorized by said section 2175. *Supervisors* v. *Klein, supra.*

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But we take the position that section 2175 has reference exclusively to and provides compensation for making copies of the regular assessment rolls filed by the county assessor alone, and by its very terms excludes the implication that it embraces the railroad assessment rolls, which are prepared by and under the direction of the state railroad commission and embrace both personal and real estate assessments, and even includes lands which are also included in the tax assessor's roll, and if he is entitled to claim for making copies of the roll, under section 2175, it would result in a contradiction of the terms of said section.

The fact that the case was set down for hearing upon bill and answer before the time expired for taking testimony cannot be taken advantage of in this case for several reasons. Appellee waived citation, entered his appearance, and filed his answer, and proceeded to permit the case to be set down and heard without any objection being made thereto, but presumably, at least, agreed that this might be done; otherwise the case would not have been heard at the time it was by the chancellor, and hence he cannot now complain that it was heard prematurely. *Hart* v. *Bloomfield*, 66 Miss. 100.

It does not appear from the record at whose instance the case was set down for hearing and hence the rule providing that when the complainant set down the cause for hearing before the expiration of the time for taking testimony, the answer shall be taken as true, does not apply in this case. See *Austin Clothing Co. et al.* v. *Posey*, 105 Miss. 720.

The answer of the appellee was not sworn to, and hence was not proof for defendant, and would not have been, even if answer under oath had been waived, which was not the case in this instance. Section 585, Code 1906, and cases there cited. At most therefore, appellee's answer amounted to no more than a demurrer to the sufficiency of the bill, and the chancellor erred in holding that it was to be considered as evidence for appellant in this cause.

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The only question, therefore, we submit, which this record presented for decision, was as to whether or not there was any authority of law for the allowance made to appellee by the board of supervisors for making the several copies of the railroad assessment rolls, as set out in appellants' bill and, the only effect which the dismissal of appellants' bill had, or could have, was to determine that the allowances were authorized by law, and were not excessive under the provisions of the statue, as a matter of law; and we respectfully submit that this finding was erroneous and the case should be reversed and remanded.

Cowles Horton, for appellee.

The cases cited by counsel are not in point. In *Hart* v. *Bloomfield*, 66 Miss. 100, the defendant had set the case down for hearing before the time allowed the complainant for taking depositions had expired. The complainant did not object to this but allowed the case to be heard at this time, thereby waiving her rights in that regard. In case at bar, complainant set the case down on bill and answer, thereby admitting the allegations of the answer and presenting the sole question, which is, whether the board had the authority to allow the clerk any compensation at all. In the other case—*Clothing Co.* v. *Posey*, 105 Miss. 721—the court adhered, in the original opinion, to the well-settled rule in such matters, but, on the suggestion of error, reversed the case, for the reason that the allegations of the answer were affirmative matters, the burden of providing which was on the defendant. Neither of these cases affect in anywise the case at bar. Our answer contained no affirmative matter. It was never incumbent on defendant to prove that the compensation allowed him was reasonable, or that the board had not exceeded its authority, or that the board had performed its duty. The presumptions were all in favor of the defendant; the bur-

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den of proof throughout—even if complainant could go behind this judgment at all, was on the complainant, and had the court below rendered a decree reducing this allowance or granting the complainant any relief at all, it would have done so arbitrarily and against every legal presumption which the law throws about the conduct of its public officals. The fact is that the compensation was reasonable. Had it not been, the board would never have allowed it. But even not, we confidently ask the court upon what portion of this record can it hold otherwise? Where is the showing that it is unreasonable or excessive? Is it not presumed otherwise? Do not the complainant's admission of the correctness of the answer make that presumption a conclusive one in the case at bar? Will the court switch the presumption and hold that complainant must recover unless defendant proves that his compensation was not unreasonable and not excesive. If so, then we shall overrule all the cases on the subject, too numerous to cite.

As finally stated by appellant, there is only one question involved and that is, whether the clerk was entitled to anything for his service. If he was, the case is bound to be affirmed; if he was not, then reversal must follow, because and only because the board was without jurisdiction to allow anything. The statutes cited settle the question plainly and the case should be affirmed.

Ethridge, J., delivered the opinion of the court.

The board of supervisors of Grenada county filed suit against John S. King alleging that King was the duly and legally elected and acting chancery clerk of Grenada county from the first Monday of January, 1908, to the first Monday of January, 1916, and that while so acting as clerk he filed a claim with the board of supervisors for services in making a copy of the tax assessment rolls filed with him by the Railroad Commission; that on these claims he was allowed on October 5, 1908, thirty

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dollars, October 4, 1909, thirty dollars, November 7, 1910, fifty dollars, November 6, 1911, fifty dollars, November 5, 1912, thirty dollars, and November 3, 1914, thirty dollars, making a total of two hundred and twenty dollars. It is alleged that these allowances are illegal and void and were accepted and retained by King as chancery clerk without authority of law, and demand is made for judgment for said sum with six per cent. interest thereon, making a total of two hundred and ninety dollars. It is further alleged that the only compensation allowed the clerk for this service was two hundred dollars per annum for services *ex officio*, but if mistaken in this that the allowance was excessive, and that said King is due the county the difference between the lawful amount and said two hundred and ninety dollars. The bill does not allege what amount would be lawful or proper in this case the clerk was allowed compensation for this work under section 2175 of the Code. The defendant answered the bill, denying that the allowance was unlawful, and that he was not entitled to the compensation; but neither the bill nor the answer discloses what would be due the clerk under section 2175 of the Code, if this compension is to be allowed under that section. The case was set down on bill and answer, and decree was for the defendant. Section 2175 of the Code reads as follows:

"The board of supervisors may allow to the clerk reasonable compensation, to be paid out of the county treasury, for making the copies of assessment rolls required by law, not to exceed one cent for each personal assessment, or two cents for each separate assessment of lands per copy; but the board of supervisors may allow as much as fifty dollars in any case for copying the personal roll."

Section 4384 requires the state Railroad Commission to assess property of railroad, telegraph, telephones, sleeping car, and express companies, and section 4387 provides that in each year the Railroad Commission shall make out for each county having any railroad, telegraph,

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telephone, sleeping car or palace car or dining car, or express company property therein an assessment roll of such property, and to assess both real and personal property, and that they may prescribe the form of such assessment which shall be as nearly in conformity to ordinary assessment rolls as is convenient and practicable and to note on each roll the property of such companies in cities, towns, villages, separate school destricts, or levee district, and after said assessments are made final by the Railroad Commission the assessment is to be sent to the counties to the clerk of the board of supervisors who is required by section 4390 to make two copies of said assessment roll as of other assessment rolls and to dispose of them as provided by law in the case of general assessment rolls and perform all duties required of him in such cases. Section 4307 of the Code provides that the clerk shall make two copies of each of the regular assessment rolls, but nothing is said in either section as to compensation for such work. Section 2175 is a general section, and applies, in our judgment, to each of said rolls, and clerk's compensation is to be determined by the number of separate assessments on each roll, taking the rolls made by the tax assessor and the rolls made by the Railroad Commission as a whole. It follows that the complainant not having specified in its declaration what companies were assessed in Grenada county by the Railroad Commission, nor the number of such assessments, and not otherwise having specified the amount that was properly allowable, that it was not entitled to judgment, and the judgment of the court below is affirmed

Affirmed.

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JOHNSTON, STATE REVENUE AGENT, v. BOARD OF SUPERVISORS OF YAZOO COUNTY.

[76 South. 543, Division B.]

1. TAXATION. *Assessments. State revenue agent. Commissions.*
Under Code 1906, section 4740, providing that after the fiscal year in which taxes become due, should the state revenue agent discover that any person, corporation, etc., has escaped taxation by not being assessed, he shall give notice to the tax collector who shall make the assessment and have the property back assessed, where the state revenue agent caused property to be placed on the assessment rolls of a county for the year 1913, this did not entitle him to commissions on the assessment for the year 1914, on the theory that he had discovered the omission of such property, where the sheriff himself placed such property on the assessment roll for the year 1914, even though the assessments were biennial, since the sheriff at any time during the fiscal year 1914 had full authority to back assess all property without reference to the revenue agent.

2. SAME.
The revenue agent does not come within the provision of the statute as to assessments for future years.

APPEAL from the circuit court of Yazoo county.

HON. W. H. POTTER, Judge.

Suit by J. C. Johnston, state revenue agent against the Board of Supervisors of Yazoo County. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

J. L. Ware and *Jas. R. McDowell,* for appellant.

The theory of the revenue agent is that since timber is part of the land, and since land is assessed once every two years, and that since the land roll for 1913 carries with it the obligation to pay taxes for 1913 and 1914, then the revenue agent is entitled to his commissions on all taxes collected on this property for 1914, as well as

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1913, since he caused it to be assessed and caused it to be placed upon the land roll of 1913, and since there is no land roll for 1914, that the assessment for 1913 stands until a new roll is made in 1915 (sec. 4301, Code 1906), unless for reasons shown to the board of supervisors it is stricken from this roll.

The fact that the tax collector by direction of the board recopied this list into the roll for 1914 (which must have been the personal roll, as there is no land roll for that year), may be treated as mere surplusage. It accomplished nothing. It was not an assessment. No notice was given to the parties to appear and not object or be heard. It was simply the clercial act on the part of the sheriff. He merely copied the revenue agent's work from the land roll for 1913, where it belonged into the personal roll for 1914 where it did not belong, and collected taxes for each year.

It is the appellant's contention that it was the duty of the sheriff not only to collect for the year 1913, but to demand taxes for 1914 on this same property for the reason that the taxes for 1914 were then due and payable though not delinquent, and that since the revenue agent was responsible for the collection of the taxes for both years because of his efforts in discovering it, causng it to be assessed and placed on the roll, he is entitled to his commissions for both years. Therefore, the question for decision is narrowed to one point, namely: Is the revenue agent entitled to commissions only where the collection of the taxes is made after the expiration of the fiscal year, which is one year after said taxes became first due, or where he discovers property and has it listed on the land roll after taxes for one year are delinquent and for the next year are made due and payable, and the tax collector proceeds to collect both years' taxes, is he entitled to his commissions on both years' collections?

By reference to section 4280 it will be seen that lands are assessed biennially. Timber is real estate. *Fox* v.

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Lumber Co., 80 Miss. 1. Also *Darnell* v. *Johnson*, 68 So. 780.

The compensation of the revenue agent is fixed by statute. Section 4748 provides that: "He shall be entitled to retain, as full compensation for his services and expenses, twenty per centum on all amounts collected and paid over by him."

This has been held to mean where such amounts are collected by the proper officials, due to the efforts of the revenue agent, as in the case here, all the revenue agent could do was to cause the property to be assessed and the board to approve the assessment, and it then became the tax collector's duty to collect the taxes, and under our contention, it was the duty to collect for both years at once, unless cause was shown why the taxes for the second year should not be collected because of removal of the property or some other good cause.

What was the intention of the legislature as regards compensation of the revenue agent? It is clear that they intended that he should make all investigations and perform all of his work at his own expense; that he should pay his own attorneys, if necessary, and that where he failed to recover, he should stand the expenses and loss, but that where the state profited by his work and through his efforts or through his investigation, money was turned into the treasury, he should receive twenty percent of the amount so recovered; and this is true whether suit became necessary or not, and it is also true whether the money be paid to him or some other officer. All that seems to be neccessary is that it shall be collected through his efforts or because of his work or as the result of his investigations.

See especially on this point the case of *Revenue Agent* v. *Bolivar County*, 75 Miss. 154; *Revenue Agent* v. *Evans*, 74 Miss. 886.

In the instant case he discovered the property; he performed the clerical services; he incurred the expense; he did the work and caused the assessment to be made, sent

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out the notices, appeared before the board and adjusted the claim, and the board approved the assessment. Under the statute he could only give notice of back assessments for 1913, but since the tax for 1914 was already due, though not delinquent, it became at once the duty of the sheriff to demand the payment of taxes for 1914 as well as 1913 because this property was then on the rolls for 1913, and being a land roll carried with it the obligation for 1914 unless some cause to the contrary is shown; so the tax collection of the tax for 1913; that was all that was necessary. He did not have to recopy the roll, and the board had no authority to order him to do so. Neither the board nor the sheriff could back-assess him at that time because he was already assessed with this property as real estate on the land roll for 1913, and this assessment stood for both years. So, since it was the duty of the sheriff immediately to proceed to the collection of both taxes under this one assessment made by direction of the revenue agent, and as a result of his investigation and labor, and since the state benefitted by his labor and for no other reason whatever, we insist that he was entitled to the compensation for both years. Of course, his compensation would be limited to these two years because in 1915 a new roll would be made and the property would be reassessed by the tax assessor, so that the revenue agent could receive no benefit in the future. Here the revenue agent did all the work for two years, the state got the taxes for two without delay, the tax collector had no option but to collect the tax. He could not wait until October, 1915, so that the revenue agent could then act and back assess this same property for 1914. The tax was due and payable, and it was his duty to collect it at once, which he did, but this collection having been made as the direct result of the labor of the revenue agent and because of the assessment whch he caused to be made, he should receive his compensation, and we thinks the court below erred in holding to the contrary.

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This is the sole question for decision, and I respectfully submit the matter for the judgment of the court.

R. R. Norquist, for appellee.

Section 4740 of the Code confers upon the state revenue agent the only authority and power possessed by him in regard to the making of additional assessments. He must comply with the provisions of that section. Section 4740 begins: "After the expiration of the fiscal year in which taxes became due should the revenue agent discovery that any person . . .has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector, etc." In the case before the court, the fiscal year in which the taxes became due had not expired, such taxes were never delinquent, but were paid when due. The revenue agent not having performed the duties imposed upon him by the above section (for the reason that there was no occasion for their performance) is certainly not entitled to the commissions claimed. He received his commissions for the assessments he made for the year 1913.

The fact that a new land assessment was not made until 1915 is immaterial. The collector is required by section 4320 of the Code to "assess and collect taxes on land liable to taxation since the last assessment." The collector complied with this section, and made the assessment in the case at bar.

It is respectfully urged that the revenue agent is manifestly not entitled to the commissions claimed in this action, and that the judgment of the court below should be affirmed.

ETURIDGE, J., delivered the opinion of the court.

J. C. Johnston, the state revenue agent, filed suit against the board of supervisors of Yazoo county in the circuit court alleging that, in pursuance of the law in re-

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gards to the assessment of property that has escaped taxation, the state revenue agent caused to be placed on the assessment roll for the year 1913 asesssments to the amount of sixty-two thousand, five hundred and four dollars, for which taxes were duly collected by the sheriff, and proper settlement made for that year with the revenue agent, that the rolls are made up biennially, and that such assessment stands for the year subsequent thereto. and that in making the said assessment in persuance of the notice the assessment was also made for 1914 under said biennial plan of assessment. He alleges that without authority of law the board of supervisors caused the assessment to be copied on the roll for 1914, and that the board owes the revenue agent a commission when the tax is collected for the year 1914, amounting to two hundred and nine dollars and nineteen cents, and pravs for judgment for said amount. This declaration was demurred to, and the demurrer sustained by the court. The revenue agent declined to plead further, and judgmnt final was entered.

Inasmuch as the period for collecting taxes for the year 1914 had not expired, and the sheriff having full authority to back-assess all property without reference to the revenue agent, we are of the opinion that the revenue agent was not entitled to a commission on the collections for 1914. The statute (section 4740, Code 1906) provides that, after the expiration of the fiscal year in which taxes became due, should the revenue agent discover that any person, corporation, property, business, occupation, or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and then provides that the tax collector shall make the assessment, give notice, etc., to have the property back-assessed. We do not think the revenue agent comes within the provision of the statute as to assessments for future years, and the judgment of the court below is affirmed.

Affirmed.

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RICHMOND PAPER CO. *v.* BRADLEY.

[76 South. 544, Division B.]

GUARANTY. *Discharge of guarantor. Proving claim against bankrupt debtor.*

The probation of a creditor's claim in bankruptcy against the estate of his debtor and the acceptance of a dividend will not preclude the creditor from relying on the guaranty.

ON SUGGESTION OF ERROR. For former opinion, see 75 So. 381.

PER CURIAM.

A re-examination of the record leads us to conclude that the several decrees rendered by the chancery court are in conflict one with the other. Complainant is made in the suggestion of error of that portion of the opinion indicating that the demurrer to the amended cross-bill should have been overruled. While there is a decree sustaining the demurrer to cross-bill, there is also a decree rendered in term time submitting the case to be tried in vacation upon bill, answer, and amended cross-bill, answer to the cross-bill, motion to suppress depositions, and the depositions on file. This decree was rendered March 10, 1916, the same day upon which the decree was entered sustaining the cross-bill as finally amended. Then, there is the final decree rendered in vacation of the court May 26, 1916, and reciting that the cause came on to be heard in vacation "upon original bill answer and cross-bill of defendant, and answer of complainant to cross-bill of the defendant, despositions of complainant, depositions of defendant, and motion of complainant to suppress depositions of defendant." The depositions and the so-called letter of guaranty are all copied into the record, and it is practically impossible for this

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court to determine the importance, if any, which the chancellor attached to the letter relied upon, or the proof in reference thereto. We agree with counsel for appellee in his contention that the letter, or true copy thereof, should have been made a part of the cross-bill. Good pleading demands this. In the present attitude of the record we adhere to our conclusion that the decree of the learned chancellor should be reversed, but we think the cause should be remanded for a new trial, with leave to either party to amend the pleadings in accordance with each party's view of the proof.

The probation of appellant's claim in bankruptcy against the estate of Barker, and the acceptance of any dividend, would not preclude appellant from relying upon the guaranty. The acceptance of the guaranty would not destroy the relationship of creditor and debtor between appellant and Barker, but any dividend declared by the bankruptcy court should, of course, be credited upon the debt guaranteed, and the balance due is a matter of proof.

JACKSON v. COLEMAN *et al.*

[76 South. 545, Division B.]

1. HOMESTEAD. *Abandonment. Liberal construction of laws.*
Homestead laws should be liberally construed for the exemptionist and an abandonment will not exist unless it is clear from the proof that the exemptionist has removed from the homestead with the intention of not returning.

2. HOMESTEAD. *Abandonment. Statutes.*
A widower, who, being unable to work on account of rheumatism, left his farm and leased it for five years in order to support his children from the rent and who tried to regain possession of the farm after he was better, did not abandon his homestead within the meaning of the Code 1906, section 2157, in relation to exemptions.

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3. HOMESTEAD. *Divorce, Alimony. Execution.*
A homestead where there are dependent children is not ordinarily subject to an execution for alimony, such a case not being among those named in Code 1906, section 2156, wherein the homestead is not exempt, and the court will not add to such exceptions.

4. HOMESTEAD. *Divorce. Alimony. Execution.*
Where there are dependent children, the homstead is not subject to a demand for alimony unless the pleadings and decree in the divorce proceedings describe and show the necessity for a lien on the homestead.

APPEAL from the chancery court of Coahoma county. HON. IVE MAY, Chancellor.

Suit by Lindsey Jackson against Emmett Coleman and others. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

D. A. Scott and *E. M. Yerger,* for appellant.

The appellees base their case on the following propositions: 1. That the trial court has rendered a decision on a question of fact, and that such a decision will not be reversed; 2. That upon the divorce of Lindsey Jackson and Alice Jackson, Lindsey had no further rights of a homestead exemption; 3. That the amount paid for the land was entirely sufficient in law; 4. That the decree of the chancellor in the case of *Alice Jackson* v. *Lindsey Jackson,* in which a divorce was granted to the former, and alimony allowed her, was, in effect, a lien upon the land, sold under execution, belonging to Lindsey Jackson, even though said land may have been, at the time of said sale, the homestead of the appellant.

Taking up the first proposition, we find that the rule of law, in this state as found in section 172, R. C. L. Vol. 2, under the head "appeal and error" is as follows:

"Under the present practice in equity, while the evidence is heard by the court *viva voce,* still the findings of the trial court are open for review, and while it is the

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general practice to defer in large measure to its decision on a question of fact, on account of its superior advantage in weighing the evidence, the reviewing court retains the right, unless otherwise provided by statute to weigh the evidence and draw its own conclusion." 2 R. C. L., page 204, section 172, and numerous authorities cited in footnote 17; *Baker* v. *Cochran,* 2 Miss. 26.

We insist, that in the instant case, the decree is manifestly wrong, that the decision is so clearly against the great weight and preponderance of the evidence that this court in its great wisdom, and love of justice cannot and will not permit the decision, handed down by the lower court to stand. *Maxwell* v. *Harkleroad et al.,* 77 Miss. 456; *Garland, Executor,* v. *Rowan.,* Q. S. & M. 630; 2 R. C. L., section 187, and 188, pp. 225-226; *Ellison* v. *Ga. R. B. Co.,* 87 Ga. 691; 4 C. J., pp. 1099, 3078.

As to the proposition that Jackson did not intend to speedily re-occupy it, the only evidence in the record, which bears out appellee's theory, is a statement which counsel for appellees, elicited for Jackson, after a very long, tedious and arduous examination, after the old man had been worried to such an extent that he hardly knew what he was doing or saying. He testified time and time again as to the efforts which he had made to lease the land for one, two, or three years, and as to the fact that finally he did lease the land for five years, when he found that he could not rent it for one, two, or three years.

As a matter of the second proposition, we submit that counsel does not cite one single authority, which would substantiate his idea. The law is settled, and we find it stated, in 13 R. C. L., page 557, coming under the head of Homestead, as follows: "Primarily, the husband, and not the wife, is the head of the family, and any man who has a wife is considered the head of a family within the meaning of homestead or exemption statutes, although he has no children. And it makes no difference that his wife may have deserted him and may be residing in an-

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other state, and that he may be living in improper relations with another woman."

As to the proposition, that the decree for alimony, in the divorce proceeding, after being enrolled, became a lien on the homestead of old man Lindsey Jackson, we find that the law is otherwise. 1 R. C. L. section 91, page 945, 21 Cyc. 521.

We will take up briefly one or two of the cases cited by counsel for appellees, on this proposition. The first is that of *Mosley* v. *Larson*, 86 Miss. 288, which explains the law in Mississippi. Adverse counsel has favored us with a long quotation from Justice Cox's opinion. We will quote from his brief only a part of this quotation, and give you our idea as to what is meant by it.

"We further hold that upon the facts averred, appellee is entitled to suit money and to alimony *pendente lite* and permanent and that the sums allowed for these purposes may be made a lien upon the homestead superior to any claim of appellants for reimbursement, etc."

We know that this is the law; that the court, having jurisdiction of the parties may decree the alimony to be a specific lien upon the land superior to the right of the homestead exemption. Counsel cites also the case of *Barber* v. *Barber*, 21 How. (U. S.) 582.

We realize that this is the law and have no fault to find with this statement of it. At least two-thirds of the cases cited by counsel for appellees, on this proposition, are directly and unequivocally in favor of the appellant, and we could find no stronger authorities no matter where we might look in our favor.

In conclusion we wish to call the court's attention to the fact that in reality there is practically no question of fact decided by the lower court. The sole real question which counsel for appellees claim to be a question of fact is that of the abandonment or non-abandonment of the homestead by Jackson which is a question of law to be now decided by this court in view of the facts as shown by this evidence.

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We submit that adverse counsel have failed utterly to sustain the several propositions advanced by them in their brief, and that under the facts as shown by the evidence and the law applicable thereto the decision of the chancellor should be reversed.

Brewer, Brewer & Brewer, for appellee.

Many of the cases cited by counsel on the question turned not only on the question of abandonment, but also upon various statutes in effect in the states where rendered. Alabama, since 1877, has an act which permits the leasing of a homestead without destroying the homestead right in the land, but prior to the passage of this act the supreme court of Alabama was called to pass on the question of whether or not the leasing of a homestead amounted as matter of law to an abandonment of it.

And until the passage of the act mentioned, it was well settled in that state that the leasing for a term of years was considered as a matter of law and abandonment of the homestead. 59 Alabama 566; 41 Alabama 302; 63 Alabama 257. When one has a homestead, and leaves it for the purpose of regaining his health, the law requires him to return to it as soon as his health is regained.

The expression of a wish to return to the homestead is not enough to entitle one to retain a homestead when absent from it.

The record here doesn't disclose that Lindsay Jackson was absent from the land by reason of some casualty or necessity, not for a period of five years, and whatever his intentions were as to returning, are quite immaterial. As the court in *Moore* v. *Bradford,* 70 Miss. 70, said: "Ceasing to reside on a homestead is rather matter of fact than an intent."

Upon the facts and the law, we respectfully submit the bill must fail. The lien of the judgment of Alice Jackson was effectual against the real property of the complainant

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here. Lindsey Jackson had been possessed of real-estate other than that claimed as a homestead, and if there had been no statute creating a lien by the enrollment of the judgment, there is a possibility that the decree would have created only a personal liability, and might not have operated as a lien, although the weight of authority is to the contrary. *Conrad* v. *Everich,* 50 Ohio, State 476.

Nor, can it make any difference that the judgment was for the payment of alimony in installment in the future. In *Story* v. *Story,* 41 N. J. Eq. 370, the court held that a decree for alimony payable in installments creates a lien upon the lands of the husband as the alimony falls due. This case is reported also in 2 Atl. Rep., 7 Atl. 525.

And it has been held that although an application for alimony does not specifically describe any property of the husband, the judgment of decree granting the application is the lien of an ordinary general judgment for the alimony so awarded. *Coulter* v. *Lumpkin,* 94 Ga. 225, S. E. Rep. 461.

We respectfully submit that the land was subject to the execution by the wife for alimony, and this view is supported by several well reasoned opinions, quoted hereinafter. *Boyle* v. *Shuman,* 59 Ala. 566; *Stown* v. *Lillie,* 63 Ala. 257; *T.* v. *T.,* 56 Miss. 36; *Bennett* v. *Dempsey,* 94 Miss. 406; *Majors* v. *Majors,* 58 Miss. 806; *Land* v. *Boykin,* 25 So. 172; *Porter* v. *Harrison,* 27 So. 302; *Hollins* v. *Crooper,* 40 So. 378; *Conrad* v. *Everich,* 40 Am. St. Rep. 584; *Mosley* v. *Larson,* 86 Miss. 288; *Thompson* v. *Tillotson,* 56 Miss. 36; *Best* v. *Zutavern,* 53 Neb. 604, 74 N. W. 64; *Mahoney* v. *Mahoney,* 59 Minn. 347, 61 N. W. 334; *Daniels* v. *Morris,* 54 Iowa, 369, 6 N. W. 532, 41 Kan. 342; *Moore* v. *Bradford,* 70 Miss. 70, 11 So. 639; *Nunn* v. *Paige,* 135 Am. State Reports——; *Tyler* v. *Tyler,* 99 Ky. 31, 34 S. W. 898; *Menzie* v. *Anderson,* 65 Ind. 239; *Conrad* v. *Everich,* 50 Ohio St. 476, 35 N. E. 58; *Coffman* v. *Finny,* 65 Ohio St. 61, 61 N. E. 155; See

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also *Hamlin* v. *Bevins,* 7 Ohio 161; *Stoy* v. *Stoy,* 41 N. L. Eq. 370, 2 Atl. 638, 7 Atl. 625.

And it has been held although an application for alimony does not specifially describe any property of the husband, the judgment or decree granting the application has the lien of an ordinary general judgment for money. *Coulter* v. *Lumpkin,* 94 Ga. 225, 21 S. E. 4617; *Bland* v. *Putman,* 32 So. 616 (Ala); *Porter* v. *Harrison,* 24 So. 302; *Birch* v. *Atchison,* 82 Ky. 585; *Mounger* v. *Gandy,* 69 So. 817; *Buffalo Savings Bank* v. *Hunt,* 118 N. Y. S. 1021; *Davis* v. *Andrew,* 30 Vt. 679; *Smith* v. *Bunn,* 75 So. 559; *King* v. *Miller,* 10 Wash. 274, 38 Pac. 1020; *Gaston* v. *Gaston,* 114 Calif. 542, 55 Am. St. Rep. 86, 102 A. S. R. 704; *Wetmore* v. *Wetmore,* 149 N. Y. 520; *Wightman* v. *Wightman,* 45 Ill. 174; *Benson* v. *Aitken,* 17 Cal. 163; 31 Wash. 397, 62 L. R. A. 974, and notes; Bishop, Mars & Div. (6 Ed.), sec. 430; *Fisher* v. *Fisher,* 32 Iowa, 20; *Barrett* v. *Barrett,* 41 N. J. Eq. 139, 3 Atl. 689; *Ryer* v. *Ryer,* 67 How. Pr., 369.

In the case of *Ex rel Brown,* above cited, (62 L. T. A.) at page 981, says: "While the appellant, under the laws of this state may, after the decree of divorce, legally remarry, the fact of a subsequent remarriage cannot relieve him of the obligation fixed by the decree."

But before his second marriage, Alice Jackson had placed her judgment of record in the office of the circuit clerk on the judgment roll, where it was notice to the world, and a valid lien upon whatever lands or property Lindsey Jackson might own in the country. *Trowbridge* v. *Spinning* (Wash.), 83 A. S. R. 817; *Sapp* v. *Wightman,* 103 Ill. 150; *Frakes* v. *Brown,* 2 Blackf. 295; *Tyler* v. *Tyler,* 99 Ky. 31; *Dufrene* v. *Johnson,* 60 Neb. 18; *Arrington,* 92 Am. St. R. 769; *Conrad* v. *Everich* (Ohio), 40 Am. St. R. 684; Secs. 819-822, Code 1906. *Scire facias* was not necessary to revive the judgment because no execution was issued thereon within a year and day after its rendition, and execution was lawfully issued without such revival. Sec. 824, Code 1906. The decree had the

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force, operation and effect of judgment at law in the circuit court. Sec. 644 Code 1906. The decree having been recorded in the judgment roll in the proper office, the circuit clerk properly issued execution thereon. Sec. 3979, Code 1906; *Buffalo Sav. Bank* v. *Hunt,* et al., 118 N. Y. S. 1021.

Further discussion is unnecessary. The report of the referee should be confirmed with costs of two motions, for fees and other necessary and proper disbursements of the claimant, Anna K. Matteson.

We respectfully submit that the decree of the chancellor should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

Lindsey Jackson, the appellant, a colored man living in Bolivar county, Miss., acquired forty acres of land upon which he lived and which he cultivated. He had a wife and three children. His wife died, and he married the second time; but the second venture in matrimony proved to be unfortunate and unsatisfactory to spouse No. 2, who sued for and obtained a divorce in the chancery court of that county, and as a part of the divorce proceeding was allowed alimony at the rate of five dollars per month and an attorney's fee of seventy dollars. The decree and the pleadings in the divorce case did not refer to the land, nor was any lien enforced against the land by virtue of the decree on its face; the decree being simply a straight judgment for such amounts, without describing any property or containing any provision that it should be a lien on the homestead of the appellant. This divorce was obtained in the fall of 1908; the appellant having at that time three children by his first wife, one of whom subsequently married, but two of whom still lived with Lindsey Jackson and were dependent upon him for support. There seems to have been no effort to collect the judgment, further than a small payment on it shortly after it was made until 1913. In the winter

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of 1908 and 1909 Lindsey Jackson became afflicted to such an extent that he was unable to perform manual labor. The affliction seems to have been rheumatism, and its possible duration could not be told. In this condition Jackson sought to rent or lease a portion of his place to certain of his neighbors for one or two years, but was unable to make a lease or to rent the land, or a part of it, for such length of time. One of the neighbors proposed to rent the place for a period of five years and pay one hundred and sixty dollars per annum therefor. The appellant, being unable to lease it and unable to work, made a lease for five years and moved on another place with some relatives, taking his children with him. This condition existed in 1913, when an execution was issued on the judgment for two hundred and twenty dollars and costs. The land was levied upon and sold without Jackson's knowledge or consent, the sale being in June, 1913, and at the time of the sale the tenant of Jackson was then in possession occupying the land as such. About October following the execution sale the claimants of the execution sale went to the tenant of Jackson, informed him that the land had been sold, and demanded possession, offering to permit the tenant to gather his crops and use the outhouses and barns, but demanding possession of the dwelling house. The tenant gave possession of the dwelling house, and when Jackson learned of this fact he moved back in the house, after advising with an attorney. But the purchasers of the land went upon the premises, ordered him off, and removed his effects from the house into the public road, whereupon Jackson filed suit to cancel the execution deed, claiming the place as his homestead. It appears that in the spring of 1909 Jackson got better and was able to do some work, and that he sought to rescind the lease, offering the lessee one hundred dollars as an inducement to surrender which the lessee refused to do. Subsequent to this, and before the execution, other parties tried to lease the place for additional time, and some to

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buy the property; but Jackson refused to do either, saying at the time that he intended to return as speedily as he could get possession of the property.

The question arises: First, had Jackson abandoned his homestead? And, second, if not, was the land subject to execution because the judgment was for alimony? It is well settled in this state that the homestead laws are construed liberally, and favorably to the debtor. The intention of the exemption laws is to enable the debtor to earn a living and create the means with which to pay debts, and to prevent hardships and suffering of families growing out of the improvident contracts of the head of the family, incurring debts. Early in the history of this state the rule was laid down that the homestead laws would be construed liberally for the exemptionist, and that an abandonment would not exist unless it was clear from the proof that the exemptionist had moved from the homestead with the intention of not returning. In this case the court said:

"We are of the opinion that it would be a harsh rule to enforce qualifying words (of the statute) according to their literal import. There must be exceptional cases. . . . Temporary absence, while traveling or visiting would most certainly not be held a forfeiture of the benefits of the exemption. The case before us is little else. So temporary residence in town for church and school purposes, leaving the homestead in charge of a tenant or overseer, still retaining the home, with an intention of returning there, ought not to be held an abandonment of the homestead right. The courts of Illinois, whose statute of exemption is in precisely the language of our law of 1857, have held that the occupancy required by the statute may be by tenants. . . . To require the actual, literal, continuous, physical occupation of the homestead by some one or more of the family would turn a humane and beneficent law into one of imprisonment and punishment. It would subject the homestead, provided by a wise and liberal policy, to the casualties of life,

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and the chances of unforeseen accidents; it would require of the family the precision of military regulations, and would demand that endless 'watch and ward,' which the law could never have contemplated. . . . We are of the opinion that the waiver or forfeiture of the homestead right should be declared only upon clear and decisive proof of an intention totally to relinquish and abandon such right, accompanied by removal from the premises, and that it ought clearly, and beyond all reasonable ground of dispute, to appear, that the abandonment was with an intention not to return and claim the exemption. A doubtful and mixed case, say the authorities, will not avail to cut off the right. . . . The homestead exemption is founded on a sound, public policy, combining in its support a variety of substantial reasons."

In the case of *Gilmore* v. *Brown et al.*, 93 Miss. 63, 46 So. 840, the doctrine is laid down that homestead exemption laws are to be liberally construed in favor of exemptionists, and in this case it was held that the fact that the owner of a country homestead voted and held office in a village to which his removal was claimed to have been temporary was not conclusive evidence of the abandonment of the homestead. It was there held that the owner of a country homestead may purchase a dwelling house in a village and move his family thereto for the purpose of educating his children, and that his qualifying as a municipal elector and holding a municipal office without forfeiting his right to claim his country home as exempt, if he keeps actual possession of it by any person or by some member of his family, cultivates it every year, and never ceases to claim it as his homestead, and always intends to return to it whenever the object for which he has removed to the village has been accomplished. In the case of *Tiser* v. *McCain*, 74 So. 660, it was held that a widow of a deceased exemptionist did not lose her right to the homestead exemption by a temporary removal to another county, where she lived temporarily with relatives, occasioned by the inconvenience of living upon the

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homestead on account of having no one to stay with her on the premises, a tenant being in possession of the homestead.

Section 2157 of the Code of 1906 provides that, when the debtor shall cease to reside on the homestead, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed. In the present case there was a necessity for Jackson to leave his homestead, under the conditions which surrounded him at that time. He had a family to support, and was unable at the time to perform physical labor, and it was necessary to use the place in some way to earn an income with which to support his family. The proof shows that he could only do this at that time by leasing his place out for the length of time that he did. He tried to secure more favorable conditions, and was unable to do so. The proof shows that he was anxious to return as soon as his physical condition permitted and that he did all in his power to protect and preserve his homestead right, and it clearly appears that he never intended to abandon his homestead. We think, therefore, there was no abandonment of the homestead within the meaning of the statute.

The next question is whether the homestead is subject to execution, being a debt or claim for alimony. Section 2156 of the Code provides that property shall not be exempt from execution in the following cases:

"When the purchase money thereof forms, in whole or in part, the debt upon which the judgment is founded; but if the judgment be not in whole for money purchase, and the execution be levied on property exempt but for the provisions hereof, and the exemptionist pay or tender the amount of purchase money included in the judgment before sale, the property shall be released; nor shall any property be exempt from sale for non-payment of taxes or assessments, or for any labor done thereon, or mate-

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rials furnished therefor, or when the judgment is for labor performed or upon a forfeited recognizance or bail bond."

We think the statute having named the cases in which the property was not exempt that no further exceptions will be made by the court. It seems to be the general rule that a homestead is not subject to the demand for alimony unless there are no children. *Biffle* v. *Pullan*, 114 Mo. 50, 21 S. W. 450; *Stanley* v. *Sullivan*, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 246; *Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; *Byers* v. *Byers*, 21 Iowa, 268. Our own court, in the case of *Moseley* v. *Larson*, 86 Miss. 288, 38 So. 234, held that the decree might be made a lien upon the homestead, if ordered by the court in its judgment granting the alimony. We think that the pleadings must at least describe the homestead, and make proper allegations of facts showing the necessity for declaring a lien, so that the defendant may know at the time of the suit that his exempt property would be claimed to satisfy the debt, and to make proper showing as to why such lien should not be declared.

In view of what we have said, the judgment must be reversed. Judgment is accordingly reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed and remanded.

DARNELL *et al.* v. SMITH *et al.*

[76 South. 547, Division B.]

SHERIFFS. *Tax sale. Fee. Statute.*

Under Code 1906, section 2197, subd. 1, cl. "E," allowing sheriffs a fee of twenty-five cents "for advertising and selling each separately described subdivision of land sold for taxes," the

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sheriff was entitled to receive this fee where he only advertised the land but made no sale, the taxes having been paid before such sale was made.

APPEAL from the circuit court of Quitman county.

HON. W. A. ALCORN, Judge.

Suit by R. J. Darnell and others against D. H. Smith and others. From a judgment for defendants, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

Mack & Black, for appellant.

The section of the Code here in controversy is in the following language: "For advertising and selling each separate sub-divisions of land sold for taxes, twenty-five cents."

It is our contention that the defendant was not entitled to collect this twenty-five cents, where the taxes were paid before the date of sale. It is well settled in Mississippi that sums allowed officers for official duties are never to be considered as penalties, but are always given and charged as actual compensation for duties performed. In other words officers cannot collect penalties and appropriate same, but can only collect compensation, fixed by the statute for duties performed. *Wynne, Administrator,* v. *R. R. Co.,* 45 Miss. 569, 12 So. 266; *Anderson* v. *Hawkes,* 12 So. 697.

With this rule well fixed in our minds to start with, in our opinion it is not difficult to decide the intention of the legislature in allowing the fee of twenty-five cents per sub-division for advertising and selling lands. *Y. & M. V. R. R. Co.* v. *Love,* 69 Miss. 111, 12 So. 266; *Anderson* v. *Hawkes,* 70 Miss. 12 So. 697.

We will here call the court's attention to a proposition of law that is well settled in Mississippi, and that is that while taxes are delinquent after the 15th day of December, and the tax collector has the right after said date to enforce payment by distress, yet if he takes no

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steps to enforce the payment of the delinquent taxes he is not entitled to charge ten per cent damages, although the taxes may not have been paid until just before the tax collector makes up his delinquent list. *Anderson* v. *Hawkes,* 12 So. 697; *R. R. Co.* v. *Love,* 12 So. 266.

It is also well stated that although the tax collector takes no steps to actually distrain, yet when he begins the work of preparing his delinquent list of advertising the property for sale, this constitutes the "or otherwise" mentioned in Code, section 2197. *Miller* v. *Delta & Pine Land Co.,* 20 So. 875.

In other words the tax collector earns his ten per cent damages either by distress or by making up his delinquent list and not otherwise, and until he does one or the other, he cannot collect the additional per centum provided by the statute.

With these principles controlling and this section of the law clearly fixed in our minds, we will next take up and consider the question of the right of the tax collector to charge the twenty-five cents for each sub-division of land, "for advertising and selling each separate subdivision of land sold for taxes."

Evidently this provision is to compensate the tax collector for some services rendered by him and, under the authorities already referred to, he cannot collect it from the delinquent tax payer unless he performs the service.

A careful examination of the Code of the state of Mississippi discloses the fact that the section there in controversy appears for the first time in the Code of 1892, being brought forward in the same language in the Code of 1906. Prior to the Code of 1892 there was no compensation whatever fixed by law for the services of the tax collector for selling lands at tax sales; that is, the actual crying them off at public auction, nor was there any compensation provided for advertising the land.

We respectfully refer the court to the Code of 1857, page 79, article 34, and page 80, article 37; to section 1699, Code of 1871, and the Code of 1880, section 524,

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dealing with the duties of the tax collector in making sales of lands, and fixing the fees, which he is entitled to and it will be seen that nowhere in said codes is any provision made for pay to the tax collector for actually making the sale, or for advertising either, and it is our contention, and we think it entirely reasonable, that the section of the code now in controversy was intended to provide compensation to the tax collector for actually crying the land off at the sale, for this is only service that he does, or could do, to earn the twenty-five cents per subdivision allowed by the statute.

We do not think the legislature ever intended to visit on the delinquent taxpayer a penalty for his delinquency, but only intended to provide suitable compensation to the tax collector for extra services rendered by him in forcing payment of taxes due on his property.

The statute fixes a fee for a complete act, that is for both advertising and selling, and both must be done before the tax collector could claim the compensation therein provided. In the court below counsel for appellees relied exclusively on the case of *Miller* v. *Delta & Pine Land Co.*, 20 So. 875. In our opinion this case has no application to the case at bar, not being in point.

It will be observed that in the Miller case the tax collector had done everything that was done in this case; that is to say, that he had made up his delinquent list; that he had handed it to the printer, but he had not actually made the sale, the sale having been enjoined.

We think it clear that the point now before the court was not involved in the Miller case, and was not decided by it, and the Miller case is not even persuasive.

In conclusion we submit that the section of the code at issue is only intended to provide compensation to the tax collector for the actual sale of the lands, and that it was not intended to recover for advertising only, for the reason, that the tax collector performed no service that would entitle him to the compensation claimed.

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That the words of the statute are plain and that before the officer could claim the fees in question the land must be both advertised and sold; that is to say, the completed act must be done before the tax collector could bring himself within the statute. Whatever right he has in this case is given by the statute, and we submit that under the plain provisions of the statute the fee is only collectible on lands, "Advertised and sold."

W. M. Donaldson, for appellee.

The power to levy and assess taxes includes the power to adopt such measures as will make their collection and payment prompt, having due regard to the requirement of due process of law, and this includes the authority to impose penalties or additional compensation to the tax collectors, upon refusal or delay in paying these taxes justly due, and such penalties or additional compensation is decided in the discretion of the legislature within reasonable limitations. 37 Cyc., page 1542.

The court of Mississippi have held that the damages and fees provided for in the collection of delinquent taxes are not penalties in this state, but are in the nature of additional compensation for extra services. *Anderson* v. *Hawkes,* 70 Miss. 639, 12 So. 697.

It follows then that the statutes providing for additional compensation are not penal statutes, but are in their nature civil, and as such statutes are not penal, they do not require strict construction.

Section 4326 provides the plan of procedure for the tax collector to pursue in regard to delinquent tax lands after the 15th day of January, and makes it a duty of the tax collector to advertise all the land in his county on which the taxes have not been paid, or which is liable for taxes, for sale, at the door of the courthouse on the first Monday of April following.

The tax collector has no authority to collect taxes until after having received a warrant in the form of a tax roll

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duly approved by the board of supervisors, and he is charged with the duty of excuting this warrant and of making returns thereon the same as other process, or warrant, which is placed in his hands. The sheriff and tax collector in executing in writing his monthly returns of collections is simply making a return on the warrant placed in his hands. The method of making this return is provided in section 4326 of the Code of 1906, the whole proceeding being a part of one scheme, and for the successive steps in the scheme, the legislature has provided compensation as set out in the fee bill.

The making of the list as provided for is an essential part of the proceeding to coerce collection and is essential to the validity of any sale which might be made by the tax collector, of lands, to compel the payment of taxes thereon. 37 Cyc., page 1294; *Huntington* v. *Spencer,* 33 Miss. 451.

It is also imperative that the list must be made and advertisement be inserted at or within the time prescribed by law, between January 15th and the first Monday in April following. The tax collector is under no duty or obligation to wait any length of time after January 15th before making the list and advertising the land. 37 Cyc., page 1294; *Carson* v. *Richardson,* 65 Miss. 222, 3 So. 579; *Miller* v. *Delta & Pine Land Co.,* 20 So. 875.

It is also essential that the copy provided for to be posted at the door of the courthouse, should be posted as a part of the scheme of advertising, in order to notify the owners that sale will be made unless the taxes are paid. 37 Cyc., page 1300.

The law also imposes upon the tax collector when making an advertisement of this character, liability to the printer for fees provided for to be paid said printer, and thus, in making advertisement as provided by law, he is compelled to assume by statute, additional responsibility, and where additional responsibility is assumed or im-

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posed by law, the collector should have additional compensation. 37 Cyc., page 1363; *Moore* v. *Magee*, 48—567.

Section 2197 of the Code of 1906, provides for the fees of the tax collector in making collections of delinquent taxes and provides separate fees for successive steps in the enforcement of collection of taxes by distress, sale, or otherwise. There are six paragraphs relating to fees of tax collectors and numerous paragraphs relating to the fees of other officers, providing fees for said officers for the successive steps in the enforcement of the collection of delinquent taxes.

It is contended by counsel for appellant that unless the whole of the fee provided for is earned, no part of it is earned and that the statute cannot be extended by implication. In other words, it is their contention that the statute must be construed in the same manner as a penal statute, and this we deny upon the authority of the supreme court in the case of *Anderson* v. *Hawkes*, 70 Miss. 639. *Miller* v. *Delta & Pine Land Co.*, 20 So. 875.

We are of the opinion that the entire section, 2197 of the Code of 1906, is to be regarded as a unit, and that whenever the tax collector had made his list of the delinquent lands and delivered the same to the printer, and posted a copy thereof at the courthouse door, he had thereby done all of the ardous duties of advertising that devolved upon him. In the language of the court in the Miller case: "There is no point in the proceeding, once begun, at which it may be said that the right to compensation has attached rather than at another. The compensation is given as a unit. It cannot be apportioned." The tax collector was entitled to twenty-five cents as held by the lower court in the Miller case, also the ten per centum damages as additionally held by the supreme court in the case.

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ETHRIDGE, J., delivered the opinion of the court.

This is a suit by R. J. Darnell against D. H. Smith, sheriff, and sureties on his tax collector's bond. R. J. Darnell was a property owner in Quitman county and failed to pay taxes for the year 1914 until after the lands were advertised for sale by the sheriff for the taxes, but the tax was paid before the sale by the sheriff. In collecting the taxes the sheriff charged and collected twenty-five cents for each subdivision of land separately described, amounting to one hundred and twenty-two dollars, and Darnell brings suit to recover this money under the theory that the sheriff could not make this charge unless the land was actually sold. The statute bearing on the question is clause "e" of section 2197, which reads as follows: "(e) For advertising and selling each separately described subdivision of land sold for taxes twenty-five cents." The sheriff is required to advertise the land for taxes, post and publish notices of advertising, to see that the lands are correctly described in the advertisement for sale, involving the reading of printer's proof; and if paid before sale is required to strike from the list the land so paid on. In our opinion, the sheriff is entitled to the fees allowed where the land has been advertised, even though the same be not sold, but that he would get no additional compensation for this service where the land is actually sold. The court below having reached the same conclusion, the judgment is affirmed.

Affirmed.

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KELLEY v. PEACOCK.

[76 South. 547, Division B.]

BROKERS. *Realty brokers. Right to commission.*

Where a landowner contracted in writing with a broker to sell certain of his lands at a named price and agreed to pay the broker a commission of five per cent. on the amount "for which the above property may be sold during the time such property may remain with him" and the broker, during such time, procured a purchaser at a greater price, who bought the land; in such case the owner was liable to the broker for five per cent. upon the price the lands were actually sold for.

APPEAL from the circuit of LaFayette county.

HON. J. L. BATES, Judge.

Suit by J. D. Peacock against A. T. Kelley. From a judgment for plaintiff, defendant appeals.

H. H. Creekmore, for appellant.

It will be readily perceived that the contract as made by Kelley with the purchaser Owens (which according to all the testimony was the only contract that Owens ever agreed to make with Peacock for Kelley) was entirely different to the terms of sale provided for in the option contract. It may have been a better contract, or it may have been a worse contract, nevertheless it was entirely different. This being true, Peacock cannot recover any commissions, because he has not complied with the terms of the contract under which he claims the commissions. *Everman* v. *Herndon,* 71 Miss. 823.

On the authority of the *Everman case, supra,* we asked for a peremptory instruction in the lower court and made a motion therefor, which is found on page 30 of the transcript. But this motion was overruled and the court refused our peremptory instruction.

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While the nominal price of the land, under the contract made by Kelley, was thirteen hundred dollars more than the price named in the option, yet he got a very much less sum of money in cash and had to carry the balance for four years at six per cent interest while under the option contract he would have had to carry a less balance two years and at ten per cent interest per annum. This makes a very material difference in the contracts, and Peacock not having performed or offered to perform according to his contract which he sues on, nor having procured a purchaser willing to buy under the terms of that contract. cannot recover.

As will be seen from a reading of the contract, it was simply one appointing Peacock as agent to sell the land, and by the terms of the contract there was no consideration and it was wholly binding on Kelley and not binding at all on Peacock. This being true, Kelly was at liberty to ignore the contract and sell the land himself. *Kolb* v. *Bennett,* 74 Miss. 567; *Stigler* v. *Jaap,* 83 Miss. 351.

We earnestly insist, however, that on the authority of the Everman case, heretofore cited, and the indisputable fact that there is no identity between the option contract and the contract of sale, the judgment below should be reversed and final judgment entered here for the appellant.

Falkner, Russel & Falkner, for appellee.

We contend, in the case at bar, that Kelley is held and firmly bound for two reasons: First, that whether or not the written "option" existed was a question of fact settled by the jury. Peacock affirmed it existed, produced the document and Kelley attempted to prove that it had been rescinded. Second, the "option" shows upon its face a valid consideration—that is, it shows that Kelley would do a certain thing to wit: make deed to Peacock or any one he might name, stating description of property, manner of cancelling his promise—"sixty days written notice," considerations, etc., and further, that

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if the land were sold at all while in Peacock's hands, five per cent commissions should be allowed. It is too plain for dispute that Peacock did bring a buyer and the sale was made. Was the deal any longer subject to unilateral attacks? Was "mutuality" any longer lacking? Surely not.

But appellant says that by virtue of *Everman* v. *Herndon, supra,* that Peacock cannot recover because, being a "special agent" with a "special contract," unless the terms were strictly carried out, Peacock must lose. Appellant forgets that there is such a thing as "waiver" on the part of a party to the contract. We respectfully submit that upon the entire facts shown on both sides that Kelly waived any "terms" stated in his written proposition to Peacock. The increased consideration of one thousand and fifty dollars, an increase from seven thousand two hundred dollars to eight thousand two hundred and fifty dollars shows that Kelly was not hurt.

Therefore, we think the proof makes it clear that the written "option," if one perfers to so name it, became a completed contract the very moment Peacock brought the buyer, Owen, to Kelley. Under all the decisions and in justice and right, Kelly owed Peacock for his services. Why not take the written contract, certainly a completed contract when the buyer bought the land, as the guide to the damages sustained by Peacock? If that is a guide then the jury made one mistake and one only; they should have given the five per cent on the sale price of eight thousand two hundred and fifty dollars and added to that the difference between the "option" of seven thousand two hundred dollars and the sale price of eight thousand two hundred and fifty dollars.

Therefore, we believe that the principles laid down in the cases relied upon by the appellant, to wit: *Kolb* v. *Bennett; Stingler* v. *Japp,* and *Everman* v. *Herndon,* serve more to show the fallacy of appellant's contention than they do to support same; the law as to unilateral

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contracts; contracts without mutuality; contracts wherein an agent is given only special powers are A. B. C. in the law; they are so well understood, in principle, that they are easily understood. But we say that the Kolb case, especially both in the opinion and briefs of counsel, make it very clear that this case is good authority for appellee and is in the face of appellee's contention on the facts. *Jaune* v. *Drake,* 41 So. 372, is along the same line as the Kolb case—it does not conflict with the case at bar. *Robert* v. *Kimmons,* 65 Miss. 332; *Welch* v. *Lawson,* 31 Miss. 170; *Stevenson* v. *Morris Machine Works,* 69 Miss. 232; *Vicksburg Waterworks Co.* v. *Guffy, etc., Co.,* 86 Miss. 60; *Roberson* v. *Cloud,* 47 Miss. 208; *Friedlander* v. *Pugh Slocum & Co.,* 43 Miss. 111; Cyc., page 333; 9 Cyc., page 334.

In conclusion let us say that the entire three cases cited by appellant, as we view them, are more against appellant than they are for him. Upon the state of facts stated in these cases, they state the law; but we insist, that the case at bar is a very different case from any of these. There was consideration, "mutuality" and complete and full performance; as far as he could, he fully performed his whole contract and, more, Kelley, appellant, received the full benefit of Peacock's labors and now refuses to pay one cent for same. The law is not thus. Justice and right was reached in this case—there is but one defect in the verdict and judgment; it is far too small amount. Of this, appellant should congratulate himself; certainly he cannot here complain. We insist that appellant waived any and all "terms" of his contract with Peacock and that Peacock was entitled to have the jury pass on both the five per cent damages and the difference in the option and the sale price.

We respectfully submit that this case should be affirmed.

COOK, P. J., delivered the opinion of the court.

This is an appeal from the circuit court of LaFayette county from a judgment in favor of the appellee in the

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sum of five hundred and ten dollars, which judgment was rendered at the September, 1915, term of said circuit court.

The case arose over a sale of land belonging to the appellant, the appellee claiming to have an option contract with the appellant, and that he had procured a purchaser for the land at a price of thirteen hundred dollars in excess of the price named in the option, and that he was entitled to recover the sum of thirteen hundred dollars, plus three hundred and sixty dollars representing five per cent commission on the option price, making a total of one thousand six hundred and sixty dollars.

The option claimed by the appellee, and upon which his suit was based, is as follows:

"In consideration of the sum of one dollar cash, and services to be rendered, I hereby agree to sell to J. D. Peacock, or such person as he may name when requested, the following property: My place containing four hundred and eighty acres, lying five miles North of Water Valley, in LaFayette county, Miss., known as the Kirkwood place, improved as follows: five houses, two barns, three hundred acres open land, two hundred cultivated, balance in pasture with forty acres in bermuda—at and for the price of seven thousand two hundred dollars, one-half cash and balance in two years at ten per cent interest. This contract is to continue in full force and effect until I shall have given sixty days' notice in writing terminating it. And I authorize the said J. D. Peacock, by his attorney or manager, to bind me by contract of sale of said land on above terms, as my sole agent until this authority is terminated above.

"I further agree to pay to the said J. D. Peacock a commission of five per cent. on the amount for which the above property may be sold during the time said property may remain with him.

"[Signed] A. T. KELLEY.

"Witness: ETHEL WOOD.

"December 12, 1908."

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To the declaration appellant, defendant below, pleaded that the contract sued on had been rescinded by mutual consent of the parties; that the contract was without consideration; that appellee had not sold the farm under the terms of the contract; and that the sale was made by appellant; and that this sale was not identical with, nor did it carry out the terms of, the contract sued on.

On the issue that the contract had been rescinded before appellant sold the land, the evidence was in sharp conflict, and the jury having rendered a verdict for plaintiff, the conflict was resolved against the defendant.

Appellant earnestly contends that *Everman* v. *Herndon*, 71 Miss. 823, 15 So. 135, is decisive of this case; that the plaintiff did not sell the land, but the land was sold by appellant and for a greater price than the contract price named in the option contract given to appellee.

We are unable to see any similarity between the case of *Everman* v. *Herndon, supra,* and the instant case. The Everman Case was a suit for the specific performance of a contract, and the court merely held that the contract performed by the complainant was not identical with, nor did it carry out the terms of, the contract sued on. The contract in the present case is a typical contract between a landowner and a real estate agent, whereby the minimum price is agreed upon, and the commissions which the agent is to receive if he sells, or is instrumental in bringing about the sale.

The plaintiff's evidence tended to prove that he brought the owner and the buyer together, and that the owner sold the land because of the work of the plaintiff. True the sale actually made was for a greater sum than the price fixed in the contract, but it is also true that appellant agreed to pay appellee "a commission of five per cent. on the amount for which the above property may be sold."

The foregoing part of the contract fixed the amount for which the owner agreed to sell, and it seems to us that appellant is not in a position to claim that he owes appellee nothing because he received a greater sum of

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money than he was willing to take for his property when he entered into the contract with the agent. "The laborer is worthy of his hire."

The jury found the facts in plaintiff's favor, but we think the verdict was for too much. The verdict was for five hundred and ten dollars, when the verdict should have been for four hundred and twelve dollars and fifty cents, this being five per cent. of the amount which appellant received for his land.

If appellee will remit the excess, the case will be affirmed at appellee's costs; otherwise the case will be reversed, and remanded for a new trial.

Affirmed conditionally.

BIG CREEK DRUG COMPANY *v.* STUYVESANT INSURANCE COMPANY.

[76 South. 548, Division B.]

INSURANCE. *Forfeiture. Waiver and estoppel. Knowledge of agent.*

Under Code 1906, section 2615, defining who are the agents of insurance companies and their powers, where the soliciting agent of a fire insurance company at the time the risk was accepted knew that the owner did not have and did not intend to have an iron safe and told him it was unnecessary to have such safe, such statement became and was the act of the insurance company, and it was bound in such case both upon waiver and estoppel.

ON SUGGESTION OF ERROR. For former opinion, see 75 So. 768.

STEVENS, J., delivered the opinion of the court.

The suggestion of error must be overruled. The position of the court is, not that a soliciting agent may waive

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important provisions of the policy after the policy is executed and delivered and becomes a binding contract, but that the principal is bound by the knowledge possessed by the agent who inspects the risk and accepts the application for the insurance. We are dealing here with the *status* or condition of property when it is first inspected as a risk, existing conditions, and not with something to be done or left undone in the future. Any other construction, in our opinion, would violate section 2615, Code of 1906, defining an "agent" of an insurance company. It is there enacted that:

Any one "who shall examine or inspect any risk, or receive, collect or transmit any premium of insurance, etc., shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract."

We are not called upon to declare all the purposes of this statute. One of its purposes certainly was to prevent fraudulent agencies. But it speaks the policy of our state, to bind the company for any act done by an agent within the scope of his duties. Here the socalled soliciting agent was fully authorized to inspect the risk and accept the business. This he did with full knowledge of the conditions and in the face of his representations that a fire proof safe was unnecessary. The question of fact as to these representations of the agent is a question for the jury. It is well settled that, if an insurance company, with full knowledge of the fact, accepts as a risk improved property which is vacant and unoccupied at the time the policy is delivered, the contract cannot be forfeited on account of the familiar stipulation against vacancy. In such case the same argument could be made as in the present case, to the effect that the soliciting agent has no authority to waive any of the provisions of the policy.

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Counsel rely upon the case of *Murphy* v. *Continental Insurance Co.* (Iowa), 157 N. W. 855, L. R. A. 1917B, 934, holding that an insurance company is not bound by a statement of the soliciting agent as to what the policy will cover when it is issued. The opinion of the court in that case guards well the distinction which we have attempted to draw, and frankly concedes that the company would be bound by knowledge received through the soliciting agent at the time the application is prepared and accepted. The court quotes from *Dryer* v. *Security F. Ins. Co.*, 94 Iowa, 471, 62 N. W. 798, and in so doing quotes to approve the following statement:

"His principal was bound by the knowledge he had when the application was prepared and accepted, but not by statements he made outside the scope of his apparent powers."

And, in quoting from the subsequent Iowa case of *Cornelius* v. *Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. 1037, it quotes to approve this statement:

"It thus appears that the application contained no misstatement of any existing fact or past transaction, nor did it omit any. What was said related solely to an anticipated, though not settled, use of the property. It was an arrangement as to conditions of the policy with which a soliciting agent had nothing to do rather than a representation of the existing or past conditions of the property to be insured."

In the present case the representations of the agent at the time the risk was accepted that a fireproof safe was unnecessary became and was the act and statement of the company itself; and, this being so, as said by Judge CALHOUN in the *Randle Case*, 81 Miss. 720, 33 So. 500, "the company therefore is bound as upon both waiver and estoppel." In this connection it is intimated by learned counsel that the language of Judge CALHOUN which we quoted in our opinion was intemperate and calculated to do insurance companies an injustice. We, of course, cannot withdraw language employed by Judge

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CALHOUN. What has been written by him is written, and we would certainly hesitate to add to or take away from the words of this distinguished and lamented jurist.

We believe the views expressed in our opinion are sound, and we accordingly adhere to them.

Suggestion of error overruled.

NABORS *v.* MATHIS.

[76 South. 549, Division B.]

1. LIBEL AND SLANDER. *Actionable words. Insulting language.*
Under Code 1906, section 10, providing that all words which from their usual construction and common acceptation are considered as insults and calculated to lead to a breach of the peace shall be actionable, it was slanderous *per se* to say of a member of the legislature that he had received money to vote for an appropriation, since such language conveyed a direct charge that the plaintiff worked for and accepted a bribe.

2. SAME.
In such case it was error for the court to instruct the jury to find for the defendant unless they believed the words used were spoken in an insulting manner.

APPEAL from the circuit court of Alcorn county.

HON. CLAUDE CLAYTON, Judge.

Suit by S. M. Nabors against M. C. Mathis. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

T. H. Johnson, for appellant.

Appellant contends that the court below erred in granting the third and fifth instructions for appellees for two reasons, towit: first, these instructions do not correctly state the law as applicable to the case at bar; and,

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second, because these two instructions are in direct conflict with the first, second, third, fourth, and eighth instructions given for appellant, and left the jury without a proper guide as to the law in the case.

We contend that if the words charged in the declaration were spoken by appellee, or if he made use of synonymous words conveying the same specific idea, appellant was entitled to recover without being required to prove that the words were spoken in an insulting manner and in a manner calculated to lead to a breach of the peace as was charged in the instructions complained of by appellant.

The words alleged to have been uttered by appellee charged appellant with the commission of a crime, the crime of accepting a bribe—a felony, one involving great moral turpitude. It is true that the charge of crime in the declaration is not made with the technical accuracy and precision as would be required in an indictment, nor is it charged by the specific name of the offense; this is not necessary, for if the defamatory words taken in the natural and ordinary signification fairly import a criminal charge, it is sufficient. 25 Cyc. 539.

In the case of *Furr* v. *Speed,* 21 So. 562, where the words charged to have been uttered were, "Mrs. Furr poisoned me," this court, on page 563, about the middle of the first column, said: "Poisoning was and is a crime at common law and by statute,—murder, if death ensues; attempt to murder if death does not follow—and to charge either crime upon a person by any expression generally and commonly understood to the persons addressed constitutes the wrong, and the words are actionable."

The crime charged against appellant by the words used in the declaration was as unquestionable a charge of accepting a bribe, as the charge in the case above cited, viz., "Mrs. Furr poisoned me" was a charge of murder, or attempt to murder, and would generally and commonly be so understood.

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Nor is it necessary that the crime should be directly charged, for if it is published as an expression of belief, or as an opinion, it is as effectual as if made in positive language. 25 Cyc. 360.

If the words alleged in the declaration, either directly, or indirectly as the expression of an opinion, charge appellant with a crime, they are actionable *per se* under the common law. We presume that appellee will admit this, and that it will not be necessary to cite authorities to support a principle of law so elementary.

If the words were actionable *per se* at common law and plaintiff would be entitled to recover upon proof of the words alleged, or synonymous words, what effect does section 10, Code of 1906, have upon them? This statute does not change the common law slander, further than to extend the grounds warranting an action of slander much further than at common law, and makes words actionable which were not so at common law.

In the old case of *Crawford* v. *Mellton,* 12 Smed. & M. 330, where the words charged to have been uttered were, "Crawford swore a lie and I can prove it," this court, after stating that such words were not actionable at common law, but were made so by the statue, as from their usual construction and acceptation they are insulting, and likely to lead to a breach of the peace, in commenting on the purpose of the statute, said:

"Manifestly, the first object of the statute was to extend the grounds warranting the action much further than they existed at common law, and to make words actionable, which theretofore were not so. Still, while this seems to be the main scope, it further provides, that no plea, exception, demurrer, etc."

Thus clearly showing that it was not the purpose or intention of the legislature, by such statute, to change the common law as to slander, but simply to extend the law to words which were not actionable at common law; and the secondary object of the statute was to change the common law pleading to the extent therein set out.

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Words which were actionable *per se* at common, are still actionable *per se* under the statute, and it is not necessary to allege or prove that the words were spoken in an insulting manner as a condition .precedent to recovery. The words themselves constitute the grossest kind of insult. If appellee uttered such words, he charged appellant with a most odious crime, one that would not only render him infamous under the law, but forever infamous in the eyes of all right thinking people.

The very language of the statute itself is such as to preclude the idea that words which are in themselves insulting, such as a charge of crime, must be said in an insulting manner before recovery can be had. It provides that, "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable, etc." There is absolutely nothing in the statute which requires words which, from their usual construction and common acceptation, are considered as insults, and which are calculated to lead to a breach of the peace, to be spoken in an insulting manner, in order that they may be actionable. This court has said in the case of *Crawford* v. *Mellton, supra,* page 330:

"The only thing necessary to bring words spoken of another within the meaning of our statute, are, that they must be insulting and calculated to lead to a breach of the peace."

If the words uttered by appellee are not inherently insulting, and are not calculated to lead to a breach of the peace, it would be impossible to conceive of words which would be considered as insults, words which are sufficiently cross to arouse the ire of a man to the point where he would be calculated to commit a breach of peace. If these words do not come within the literal meaning of the statute, no words can be uttered to fall within its condemnation. If such words, from heir usual construction and common acceptation, are considered insults, and are cal-

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culated to lead to a breach of the peace, they are actionable regardless of the manner of their speaking.

W. C. Sweat, for appellee.

The only complaint that counsel for the appellant has, the only error alleged, is the error in giving the third and fifth instructions given for the appellee. That part of the third instruction complained of is as follows: "Yet unless you further believe by a preponderance of the testimony that they were spoken in an insulting manner you cannot find for the plaintiff; and you will find for the defendant in this case."

That part of the fifth instruction complained of, is as follows: "Yet unless you further believe that they were spoken in an insulting manner and in a manner calculated to lead to a breach of the peace, you will find for the defendant."

It is contended by the appellant that the manner of the speaking of the words have nothing to do with the right of recovery, and that the mere fact that words were spoken, as were alleged to have been spoken by the defendant in this case, is sufficient in itself to entitle the plaintiff to damages; but our contention is that the simple fact that these words may have been spoken by the defendant is not sufficient in itself to entitle plaintiff to recover, but the manner in which they are spoken is the very gist of the action. This court has held in the case of *Crawford* v. *Melton,* 12 Smeads & Marshall, 331, that: "The gravamen of the action is the saying of any words, whether true or false, in an insulting manner."

It is said by counsel for the appellee that when the court used this expression, it had under consideration the secondary feature of the law, the justification by way of setting out the truth of the charge; but, as the expression of the court itself shows, it was considering the primary feature of the law.

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The manner in which the words are spoken is not only an important consideraion under the law, but the manner of the speaking of the words is the very foundation on which the plaintiff must rest his case. Suppose the words were spoken in such a manner as to show that the defendant knew that they were not true and that he placed no credence in them, could it be said that they are actionable then? If they are spoken in such a manner as not to lead to a breach of the peace, then plaintiff would certainly have no ground for complaint. The plaintiff must make out his case by a preponderance of the testimony. Why is it placing too much burden on the plaintiff to be required to show that the words were spoken in such a manner as would be calculated to lead to a breach of the peace? If they are spoken in such a manner not calculating to lead to a breach of the peace, he has no cause of action. If they are spoken in a manner calculated to lead to a breach of the peace, he had a cause of action. The burden is on him to show that he has a cause of action. He must show not only that the words were spoken, but that they were spoken in an insulting manner. To say that the plaintiff must show that the defendant spoke the words in an insulting manner is nothing more nor less than saying that he must show the intent of the defendant. If his manner is such he must show the intent of the defendant. If his manner is such as to indicate that his intention is malicious or mischievous, or that he intended to do the plaintiff the injury, then the plaintiff has a cause of action, if the intention was otherwise, the plaintiff has not. The instruction approved by the court in the case of *Furr* v. *Speed,* 74 Miss. 424, carries out this idea.

"The court further instructs the jury, for the defendant, that unless they believe, from the evidence, that the defendant intended, by what he said, to charge the plaintiff with the intentionally administering poison to him, with intent to kill and murder him, then they will find for defendant."

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Conceding for the sake of argument that instructions three and five, given defendant, did not correctly state the law, the plaintiff cannot complain for the reason that the error there complained of is entirely cured by the instruction for the plaintiff.

This court will not do a vain and useless thing. A case will not be reversed for error which is harmless or for error which the court is bound to conclude would not change the result. Why reverse a case and order a new trial when the testimony is so overwhelmingly in favor of one of the parties that no other conclusion could be reached than the one which was reached in the former trial? We say that there was no error committed by the court below; and, even if there was, it was harmless error and no other result would be reached than the one which was reached, and the case should be affirmed.

COOK, P. J., delivered the opinion of the court.

Appellant began this suit in the circuit court of Alcorn county, under section 10, Code 1906, "Actionable Words." The evidence in support of the averments of the declaration was conflicting. Plaintiff proved by several witnesses that defendant said in the presence of witnesses that he could prove that plaintiff, while acting as a member of the legislature, had—"voted to kill our home Agricultural School at Kossuth, and voted and did all he could to get a fifty thousand dollar appropriation for a negro school in the Delta. I can't prove this, gentlemen, but it is my honest opinion, and the opinion of others, that he got eight thousand dollars or ten thousand dollars from some of them rich negroes in the Delta to give them that school."

The witnesses did not agree as to the exact words employed by defendant, but they were in substantial agreement that he used the words above quoted, or words of similar import, conveying the imputation that that plaintiff had been paid for his vote and influence.

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The evidence for defendant contradicted the evidence for plaintiff. In this state of the record, the court, at the request of defendant, instructed the jury as follows:

No. 3. "The court charges the jury for the defendant that the gravamen of the action in this case is the fact that the words were spoken by the defendant of the plaintiff in an insulting manner, calculated to lead to a breach of the peace; and although you may believe by a preponderance of the testimony that the words were spoken by defendant, yet unless you further believe by a preponderance of the testimony that they were spoken in an insulting manner, you cannot find for the plaintiff; and you will find for the defendant in this case."

No. 5. "The court charges the jury for the defendant that, although you may believe that the defendant spoke the words alleged to have been spoken by him, or that he spoke the words of similar meaning, unless you further believe that they were spoken in an insulting manner and in a manner calculated to lead to breach of the peace, you will find for the defendant."

The jury returned the verdict for the defendant, and it is insisted that they were influenced to do so by the instructions just quoted.

There can be no doubt that plaintiff was entitled to a verdict, if the jury believed that defendant used the language imputed to him. The words were libelous *per se*. They conveyed a direct charge that plaintiff worked for and accepted a bribe; that he was a felon and should be in the penitentiary rather than in the legislature. There is no question of the insulting character of the language Mr. Mathis is said to have used, and we may say, with confidence, that the average adult male would "raise a rough-house" and manhandle the fellow who charged that he had perjured himself and accepted a bribe.

The instructions should not have been given, and we cannot say that they did not mislead the jury.

Reversed and remanded.

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EVANS v. CARPENTER.

[76 South. 550, Division B.]

CHATTEL MORTGAGE. *Conversion of mortgaged property by mortgagor's landlord.*

Where a landlord having waived his lien except as to rent on the tenant's share of the crop, in favor of a deed of trust given by the tenant to a supply merchant, sold the cotton, raised on the rented premises, in his own name and after deducting moneys due him, paid the balance to the tenant knowing of the merchant's trust deed. In such case the landlord should have turned the money over to the merchant after deducting his land rent and his failure to do so was a conversion of the cotton for which he was liable to the merchant mortgagee.

APPEAL from the circuit court of Alcorn county.

HON. CLAUDE CLAYTON, Judge.

Suit by G. W. Evans against J. W. Carpenter. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. C. Sweat, for appellant.

There is very little controversy about the facts in this case. Patterson lived on Carpenter's place. Carpenter did not want to furnish him. Evans agreed to furnish him, provided Carpenter would waive his landlord's lien in favor of Evans. This Carpenter agreed to do and did do, and Evans furnished him. Evans was therefore entitled to the proceeds of the sale of the cotton, except the rent; this Carpenter well knew. When Carpenter took the cotton to town, sold it in his own name, took charge of the money and deposited it in the bank, he thereby appropriated the money which belonged to Evans and which, by his waiver of his landlord's lien, he had agreed that Evans might have to his own use. The fact that, on the next day, he gave Patterson a check for a

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part of the money and cash for the balance of it, can make no difference whatever. Carpenter had no more right to turn this money over to Patterson than he had to turn it over to a stranger, knowing, as he did, that Evans had furnished him on the strength of his waiver of his landlord's lien and on his faith in the fact that he would be able to subject the crop to the payment of this debt. When Carpenter sold this cotton and took charge of the woney, the only remedy that Evans had was to bring suit against Carpenter, which he did.

Carpenter, in his testimony admits that he sold this cotton; that he sold it in his own name, that he took charge of the money. He also admits that he waived his lien in writing to Evans, all except the rent. In the face of these admissions on his part, what right did he have to pay this money to Patterson?

In the case of *Chism* v. *Alcorn,* Mrs. Alcorn owned a plantation and rented it to Bush. Mrs. Alcorn waived her landlord's lien in favor of Chism Bros., who furnished Bush. Afterwards, Mrs. Alcorn sold the crop and appropriated a part of the money to her own use. Chism Bros., then brought suit against Bush and Mrs. Alcorn jointly. Chism Bros. testified that Mrs. Alcorn never agreed to pay the debt, and the court said that Chism Bros., could not recover on this debt but indicated that, if they had brought the suit for money had and received, they could have recovered against Mrs. Alcorn. In his opinion, Judge COOPER used the following language:

"If they had sued for money had and received to their use, or in an action on the case, their testimony would have tended to support their action. This they did not do, but sued both Mrs. Alcorn and Bush, the tenant, on the open account for goods, wares and merchandise sold and delivered to Bush." *Chism* v. *Alcorn,* 71 Miss. 508.

The thing that we are doing here is suing Carpenter for money which he received and appropriated, and which he failed to turn over to Evans and to which he knew at the time that Evans was entitled.

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These being the facts and undisputed, the peremptory instruction should not have been given, but at that time, on the evidence then before the court, plaintiff was entitled to a peremptory instruction.

There is another reason why the appellant should have recovered in this cause. Carpenter was liable to Evans for the conversion of this property. Under the facts in this case Carpenter had no right or title to it, and Evans had a right to subject it to the payment of his debt. The doctrine is admirably stated in 38 Cyc., as follows:

"Any distinct act of dominion wrongfully exerted over the personal property of another in denial of his right or inconsistent with it is a conversion. 'The distinction between trespass is this: that trespass is an unlawful thing as, for example, the unlawful removal of the property'—while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership. 'A conversion may be either, first, by wrongfully taking a personal chattel; second, by some other illegal assumption of ownership, or by illegally using or misusing goods; or third, by a wrongful detention.' It is not necessary that there should be a manual taking or that it should be shown that defendant applied the chattel to his own use. 'The test is, does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights?' " 38 Cyc., p. 499.

For these reasons, I submit that the case ought to be reversed and the cause remanded for a new trial.

J. M. Boone, for appellee.

The appellant contends that it was the duty of the landlord not to turn the money over to his tennant, J. W. Patterson, but that it was his duty to look up the beneficiary in the trust deed, G. W. Evans, and turn the money over to him. In support of this contention he cites two authorities, one a Mississippi authority, *Chism Bros.* v. *Alcorn*, 71 Miss. 506, and section 2, 38 Cyc., p. 499.

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In the Alcorn case the testimony of the plaintiffs tended to show that in consideration of a waiver by the appellants of her landlord's lien, and an agreement that the proceeds of the tenant's crop should be first applied to the payment of the debt, the goods were sold to the tenant to enable him to make a crop on the leased premises. The goods were sold on the security of the crop and the plaintiff looked to that source for payment.

In that case the tenant raised enough cotton to pay the account. The crop was received and sold by Mrs. Annie Alcorn who paid one hundred dollars on the account and appropriated the remainder. The record does not say so in so many words, but it leaves no other conclusion but that Mrs. Alcorn waived her landlord's lien for both rent and supplies, for the crop was to first pay the account. While in the case at bar the appellee, did not waive his landlord's lien as to rents, but only for supplies.

Mrs. Alcorn, did not turn the money over to the tenant, so that he could take the money and discharge his account for the supplies but appropriated it to her own use.

In the case at bar, the appellee, J. W. Carpenter, did turn the money over to the tenant to discharge his indebtedness for supplies; the tenant in this case, J. W. Patterson, told the appellant that the money from these two bales of cotton had been turned over to him, that he had placed the same in the bank and that he, the tenant, would come to town on Saturday, get the money and turn it over to Evans on Monday.

As to the citation from 38 Cyc., page 499, the taking in the case at bar could not be called wrongful. Therefore counsel for appellant has to stand on No. 2, "by some illegal assumption of ownership, or by illegal using or misusing goods." The appellee in the case at bar did not illegally assume ownership of the cotton sold, for he had a fourth interest in the cotton, besides he was instructed by the tenant, J. W. Patterson, to take possession of the cotton, the cotton at that time being in the possession of the tenant, J. W. Patterson, and to sell the

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same. Now did the appellee illegally use or misuse the cotton? He sold the same by mutal agreement of landlord and tenant, and turned the money due the tenant over to the tenant. Under what mode of reasoning can counsel for appellant claim that the acts of the appellee were illegal using or misusing of the cotton in this case.

We wish to carry the quotation from Cyc., just a little further than the counsel for appellant carried it. "Conversion, like trespass, requires a positive tortious act. 'Nonfeasance, or neglect of legal duty, mere failure to perform an act made obligatory by contract or by which property is lost to the owner, will not support the action.' According to the prevailing view, the purchase of property, from one who has no power to dispose of it, constitutes a conversion, and no demand for its return is necessary." 38 Cyc. 500.

I know of no law which will prevent a landlord and tenant to agree to sell their cotton, on a certain day, in a certain market, and divide the proceeds of the sale according to their respective interest in the cotton.

The record shows that the landlord, Carpenter, deducted from the proceeds of the bale of cotton a sufficient amount to pay for the ginning and wrapping. "Where a landlord has advanced money to a tenant to pay for picking, ginning, baling, and hauling the cotton upon which he has a lien for his rent, and the tenant has delivered a part of the cotton in payment of such advances, a trustee in a deed of trust on the cotton for supplies furnished the tenant cannot recover the cotton from the landlord, though the advances were made after the landlord had notice of the deed of trust. If it appears that they were used for the common good of those interested and were essential in order that the crop of cotton might be made available to the parties interested. And the right of the landlord in such case is no more than would be the right of any other party in interest making advances in like circumstances." *Strauss* v. *Bailey,* 58 Miss. 131.

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"A lien of the landlord for rent is superior to and prior to a deed of trust on the same crop. *Storm et al.* v. *Green,* 51 Miss. *Arbuckle* v. *Nelmes,* 50 Miss. 557; *Roberts* v. *Simms,* 64 Miss. 597; *Strauss* v. *Bailey,* 58 Miss. 131; *Payne* v. *Aberdeen Hard. Co.,* 66 Miss. 323; *Bacon* v. *Howell,* 60 Miss. 362.

"A grantor in a deed of trust for supplies on a crop of cotton to be raised by himself can sell or give away the products, when made and his vendor or donee, acquires the legal title subject to the incumbrance." *Black Tood & Company* v. *Robertson,* 61 Miss. 54.

"Where the evidence of a party accepted as true is wholly insufficient to maintain the issue, a motion to exclude it should be sustained." *Mississippi, etc., Packet Co.* v. *Edwards,* 62 Miss. 534.

We contend that the acts of the landlord in selling the cotton raised on his place, by agreement with his tenant for a fair and market price, and turning the tenant's part of said sale over to the tenant, was not a conversion of the property of the beneficiary in the trust deed for supplies.

The court did proper in sustaining the motion of the appellee and directing a verdict for the appellee.

ETHRIDGE, J., delivered the opinion of the court.

The appellant, Evans, was a merchant, and Carpenter was the owner of a plantation, a portion of which he leased to a tenant. The tenant desired Mr. Evans to furnish him certain supplies, and Mr. Carpenter waived his lien against the crop of the tenant except to land rent. As to the land rent he was to get one-fourth of the cotton and cotton seed grown upon the premises. Mr. Evans took a deed of trust on the tenant's crop, having the waiver above mentioned, and furnished supplies to the tenant. Carpenter admits signing the waiver in question and of the existence of the deed of trust and its record. When the cotton was ready to be marketed the

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tenant turned the cotton over to Mr. Carpenter, the landlord, who sold it in his own name. The cotton and seed together amounted in value to sixty dollars and ninety-four cents for the tenant's portion. The landlord deducted from the price of the cotton certain moneys due him for seed furnished or loaned the tenant, and turned the other part of the money over to the tenant instead of to Mr. Evans, the merchant. There was a judgment in the justice court, where the cause originated, for fifty-two dollars and eighty-four cents and Carpenter appealed to the circuit court, where the circuit court granted a peremptory instruction in Carpenter's favor, and Evans appeals here. We think Mr. Carpenter having sold the cotton in his own name and taking charge of the proceeds of said cotton was a conversion of the cotton. He had knowledge of the merchant's deed of trust, and should have turned the money over to the merchant after deducting his land rent. There is no dispute as to the value of the cotton, and judgment should have been entered for the appellant for fifty-two dollars and eighty-four cents and costs. The judgment of the court below is accordingly reversed, and judgment here for said amount for the appellant, with all costs.

Reversed, and judgment here.

GLOSTER COMPRESS & TRADING CO. v. MAYOR AND ALDERMEN OF TOWN OF GLOSTER.

[76 South. 550, Division B.]

1. MUNICIPAL CORPORATIONS. *Taxation. Review of assessments. Time for appeal.*

A motion to dismiss an appeal from a municipal assessment because not filed within five days after the assessment, was properly overruled, where the appeal was filed within five days after

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the assessment roll was approved, since there could be no appeal until the roll was approved.

2. EVIDENCE. *Value. Price at which property is offered for sale.* On an appeal from a municipal assessment for taxes on a cotton compress and warehouse, it was competent for the owners to introduce evidence that they were willing to sell and had offered to sell it for a less price than the amount of the assessment, where there was evidence that such offer was not in the nature of a forced sale; but was a *bona-fide* offer by the owners and in their opinion was a just valuation of the property in view of prevailing conditions.

APPEAL from the circuit court of Amite county.

HON. R. E. JACKSON, Judge.

Proceeding by the Gloster Compress & Trading Company against the Mayor & Aldermen of the Town of Gloster on an appeal for municipal assessment for taxes. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. G. McLain, for appellant.

In the case at bar, plaintiff desired to do more than merely present the owners ideas of value and offers of sale, and made an attempt to offer evidence to show that the owners had same listed with real estate people and were making every effort to dispose of this property at certain figures, and that notwithstanding the efforts of the real estate people to sell, no sale could be effected due to the fact that the property was practically worthless. In other words this was not a mere offer to sell or an expression of what the owners would accept, but was an actual listing with real estate people, a *bona-fida* offer. Attempt after attempt along this line could have been shown both by real estate men and by the owners but the court excluded. We believe this was error.

If any value is true it is market value, and there is no way of demonstrating such value except by repeated efforts to sell, and by the evidence of responsible real estate people tending to show the true market value. It

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is utterly beyond us to understand upon what theory such evidence is excluded especially where it is manifest that same is more than the mere opinion and offer of the owner given possible for purposes of litigation. It seems to us that the nature and character of the evidence itself should have weight in determining the question of admission or exclusion.

Even if the owner's evidence were excluded, there exists no reason for the exclusion of the evidence of the third party, for such evidence is the practical guide for the determination of the question of market value, and market value is the opinion of the world as to the real value of any given commodity or piece of property. Plaintiff was clearly entitled to introduce proof along this line, and of the nature and character as set out in the preceding pages of this brief and verified by the record.

If the court should deem the foregoing errors insufficient cause for reversal, we wish to present the following error which we assign as positive cause for reversal and upon which we rely absolutely. The error of the court in excluding all evidence offered by the plaintiff and instructing for the defendant. In the court below we were confined to opinion evidence and at the end of plaintiff's proof the court sustained a motion to exclude on the theory that plaintiff had failed to make out a *prima-facie* case. The record fails to sustain this view.

We respectfully insist that it is not necessary in order to entitle plaintiff to go to the jury that we be forced to drag into court all the land people, carpenters, architects, and other so-called experts, to render evidence, but that it is sufficient to present one witness and by that witness offer competent evidence and it must be met and the issue refuted.

Excluding evidence before any is offered in behalf of a defendant in a cause is a very particular and strict proceedings and is not countenanced by any court unless there is no testimony whatsoever offered that will sup-

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port the issue. It is of no import as to the strength or weakness of the evidence; that is for the jury to determine; the sole question is, can the issue be supported? Is there sufficient evidence offered that will require the defense to overcome same by offering proof? One shred of competent proof requires this burden to be met and it must be overcome. In the case at bar the plaintiff had ample evidence to sustain the issue in the absence of proof to the contrary, and whatever might have been the outcome after the evidence of the defendant was in, the plaintiff was entitled to have such evidence met by the defendant.

In support of these contentions and in full explanation of same we cite the following authorities: *Richter* v. *Beaumont,* 67 Miss. 285; *Alexander* v. *Zeigler,* 84 Miss. 560; *Anderson* v. *Telephone Co.,* 86 Miss. 341.

To sum up the whole proposition: A motion to exclude coming immediately after plaintiff rests and before offering of testimony by the defense should only be sustained in those exceedingly rare cases where the evidence is absolutely frivilous and incompetent. In all other cases the plaintiff should be allowed, to proceed.

We urge upon the court that the case at bar, under the facts and the law, should be reversed and remanded for a new trial in accordance with these views.

J. T. Lowrey, for appellee.

The learned counsel for the appellant urges two arguments in his brief, for the reversal of this cause, to wit: (1) The improper exclusion as he thinks, of evidence offered by him, and (2) the error, as he thinks, of the trial court in excluding all the evidence of appellant and instructing the jury to find for the defendants.

I will answer these arguments in the order named. As heretofore stated, the only two matters which the counsel for appellant endeavored to make proof of which were excluded were (1) that the property had been of-

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fered for sale by the appellants for ten thousand dollars, and (2) the comparative values of other property in the town of Gloster owned by people other than the appellants.

Was it error for the trial court to exclude evidence of the appellant's offer to sell this property for ten thousand dollars? Suppose that we analyze for a moment. A man might be perfectly willing to sell his property for a given sum, and still the sum he was offering it for might be far below its actual true value. I might have a piece of land situated far away from my home, as in the case at bar, where my personal supervision could not be given to the management of it, and would in all probability be willing to sell it at a sum far below its actual value. A man might be a bad trader; for instance one might buy an automobile, for one thousand dollars and try to operate it, and fail, or might break some part of it that it would cost him considerable to replace, and offer it for sale far below its true value. Would it be just, fair, or equitable for these considerations to control in the assessment of the property for taxes? I submit not.

I might own a plantation in the Delta that is worth twenty thousand dollars and being unaccustomed to conditions there, and being far away from it, and not able to give it my personal supervision, loose one or two crops on it, and become indebted for its operations, and offer it for sale for two thousand dollars. Now the question; would it be fair, just, or equitable for this twenty thousand dollar plantation to be assessed for two thousand dollars and the state and county, and if in a town, the municipality be deprived of the taxes on eighteen thousand dollars just because I wanted to sell it for the sum of two thousand dollars? Manifestly not.

Is it right, fair, just or equitable, for the Gloster Compress & Trading Company, a corporation, which is owned and dominated by New Orleans capitalists, to own a Compress property in the town of Gloster, Mississippi, which is worth four hundred thousand dollars and which Mr.

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Hiller, the vice-president testifies on oath cost forty thousand dollars to construct, and just because these people have taken a notion, being traders, to sell this property for ten thousand dollars to deprive the municipality of its just *pro rata* of taxes on the difference, just because the Compress people have decided to sell it? Certainly not.

Section 4268 of the Code of 1906, provides: "It shall be the duty of each person fixing the value of his property to estimate the same at its cash value at the time of valuation, and not what it might sell for at a forced sale, but what he would be willing, and would expect to get for it if he were disposed to sell it," etc.

We see from this statement of the law that it is the duty of a man to give in his property to the assessor at its cash value, at the time of the valuation. What the person might be willing to take for it under given conditions, is no criterion, but it must be what he would reasonably expect to get for it were he disposed to sell it, he to be the guide in giving it in to the assessor.

We will now notice the contention of the appellant that the trial court erred in excluding all the evidence of the appellant, and instructing the jury to find for the defendant. The rule in Mississippi, cannot be better stated than was stated in the case of *Flora* v. *American Express Company,* 92 Miss. 66 : "A defendant is entitled to a peremptory instruction where the court, on the testimony, would have been compelled to set aside a verdict returned for the plaintiff."

Taking as true every statement proved by the appellant, is it entitled to the relief which it is seeking?

Now, I submit further, as complete and conclusive argument for the affirmance of this cause: 1. I maintain this position I took in the court below, that the finding of the board of aldermen should be allowed to stand, because there was no jurisdiction acquired by this appeal.

The facts are that on the 5th day of October this property was equalized, and the value fixed by the board of

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aldermen, and no objection was had until the sixth, I am not unmindful that counsel could have appealed from an order adopting the assessment, but no such order is shown by this record. And having not appealed from the order of the fifth, until the twenty-first day of October, his time had expired, for the language of the statute cuts him out, for it provides that the appeal shall be taken "within five days from the date that the meeting is held," and no appeal having been taken until the 21st, he was cut out and barred by lapse of time. There being no order adopting the assessment roll as a whole, shown, he could not appeal from such. I submit that the circuit court had no jurisdiction to try the cause, and for this reason the appeal should have been dismissed and the town and tax collector permitted to proceed to collect the taxes.

2. I maintain that no value of the property having been proved, that the value as placed by the board of aldermen must stand, as the true value of the property for this assessment.

3. This cause should be affirmed because the testimony of the witnesses for the plaintiff all show the property to be worth the sum of fifteen thousand dollars and more, and this court will not reverse a case where appellants own witnesses show the converse of their contention.

4. The evidence shows conclusively that appellants believe the property worth more that fifteen thousand dollars for they wanted to charge five hundred dollars for a four months' rental of it. Actions speak louder than words, and they were talking when they offered it for sale, and acting when they wanted to rent it for five hundred dollars for the four months.

5. The value as fixed by the board of aldermen, must stand as being correct, and a true value of the property, and is presumed in law to be the proper value for it to be assessed for the year 1915, especially in the absence of proof in the record to show that the actual, or intrinsic value was less than the sum of fifteen thousand dol-

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lars and no such proof has been made to the court, as shown by the record.

6. Giving the appellant the benefit of a liberal construction, with all inferences growing therefrom, after a careful, full, and impartial reading of the record, we are driven to the conclusion that the trial court reached the only proper conclusion for the disposal of this cause.

I submit that a careful reading and consideration of this record will result, unquestionably, in the affirmance of this cause, and that to that end the municipal officers be permitted to proceed with the collection of the taxes which the appellant has for so long kept in his pocket, and which should have been paid into the town treasury long ago.

I respectfully, and confidently ask for the affirmance of this judgment.

ETHRIDGE, J., delivered the opinion of the court.

The Gloster Compress & Trading Company is a corporation owning a compress and warehouse in the town of Gloster. This is an appeal from an assessment by the town of Gloster upon said property. The property had formerly been assessed at five thousand dollars but was assessed in the present instance by the municipal authorities at fifteen thousand dollars, the assessment having been made on the 5th day of October, as to this particular property, and said assessment entered on the roll on said 5th day of October. On the following day the agent of the appellant appeared before the board and protested against said assessment and asked that it be reduced to ten thousand dollars, which the board declined to do. The roll as an entirety was approved on the 18th day of October at an adjourned meeting, and on the 21st of October petition for appeal to the circuit court was filed. When the case reached the circuit court on appeal a motion to dismiss because the appeal was not filed within five days after the assessment was made. The court

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overruled this motion to dismiss, and we think correctly so, as there could be no appeal until the roll had been approved.

On the trial of the case in the circuit court the plaintiff. or appellant, introduced testimony showing that after the compress was erected that the cotton industry in and around Gloster was practically destroyed by the boll weevil, and that the business of compressing had been abandoned, and that the building and warehouse was much reduced in value by reason of the destruction of the cotton industry and the financial conditions in and around Gloster following the advent of the boll weevil. The plaintiff also introduced testimony of some of the officers and stockholders of the corporation showing that the property had been offered for sale for ten thousand dollars, and that in their judgment that would be a fair price for the compress and property of the company, and that they would be glad to sell for that amount. One of the witnesses was asked to state whether or not the compress was for sale, and, if it is for sale, at what figure, and the answer was that it "is for sale, and we would entertain a reasonable bid for the same, having offered it at ten thousand dollars, and willing to accept seven thousand five hundred." This question and answer was objected to and objection sustained. Witness was then asked to "please state whether or not you have ever in the past three years offered said compress for sale, and, if so, state the names of the parties and the price at which you offered same," and answered, "Upon an inquiry from Mr. G. H. Barney, we, in our letter of January 23, 1915, offered the property at ten thousand dollars, and in our letter of February 6, 1915, to Mr. C. A. Gordon, Port Gibson Miss. we again offered the compress property including everthing for ten thousand dollars." This question and answer was objected to, objection sustained by the court, and the testimony excluded. Witness was then asked "whether or not such offer was in the

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nature of a forced sale or whether you really believed such offer to be a just valuation at the prevailing conditions in the adjacent cotton belt," and answered, "Our offer was by no means in the nature of a forced sale, and we believe the price at which we offered it a fair valuation under the prevailing conditions." Witness was then asked, "Please state whether or not you are willing to take ten thousand dollars for this property," and answered, "We are willing to sell the property for ten thousand dollars." Each of these questions and answers were objected to, and objection sustained by the court. There was other testimony of similar import, but the trial judge seems to have based his rulings upon the idea that the witnesses would have to qualify with knowledge of value and testify directly to the actual value of the property. We think the evidence was competent on the question of value. Considerable latitude is allowed in questions of value, and taking the testimony in this case from the witnesses with their knowledge of the conditions and surroundings, we think the testimony should have gone to the jury. The court gave a peremptory instruction at the conclusion of the testimony for appellees after sustaining these objections and ruling out this evidence. We think the case should have gone to the jury under proper instructions, and that the testimony should have been admitted and gone to the jury on the question of value with the other evidence in the case.

Judgment is reversed, and the cause remanded.

Reversed and remanded.

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BATES ET AL. v. BREVARD-WOODS STAVE CO.

[76 South. 533, Division B.]

1. EVIDENCE. *Presumptions. Intent.*
The presumption of law is that every man intends to do what he does do, and in the absence of the proper showing of honest mistakes, the defendant would be held to have wilfully done what he did do.

2. MASTER AND SERVANT. *Cutting timber. Trespass. Liability.*
It is not sufficient for the purchaser of standing timber of certain dimensions only, to send out a bunch of laborers with general instructions to cut only the timber of the dimensions purchased; but it devolves upon him to exercise reasonable superintendence over the employees, to see that they cut the timber according to his contract and with due regard to the rights of the other party.

APPEAL from the circuit court of Coahoma county.

HON. J. L. BATES, Judge.

Suit by Wm. S. Bates and others against the Brevard-Woods Stave Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Wm. S. Bates, for appellant.

We submit that the case made by appellant's evidence on the trial of this case in the court below, fully supports the allegations in appellant's first count of declaration, and more than makes out a *prima-facie* case of trespass as therein charged, and right to recover the statutory penalty given by section 4977, Code 1906, and casts the burden of proof upon appellees to relieve themselves from the penalty, by adducing evidence that the trees shown to have been cut by appellants, was through accident, inadvertance or mistake, or not so cut while they were in lawful possession of the land, and that rea-

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sonable care was taken to avoid the trespass charged in said count. *Kiern* v. *Warfield,* 80 Miss. 799; *Rector* v. *Shippy,* 93 Miss. 245.

Therefore, our first contention of error is that the trial court misconstrued both the law and appellant's evidence, in its ruling sustaining appellee's motion to withdraw appellant's evidence from the jury, and instruct a verdict for them as to the first count of appellant's declaration. *Lee* v. *Hawks,* 68 Miss. 669; *Kern* v. *Warfield,* 60 Miss. 799; *Rector* v. *Sheppy,* 9 Miss. 254; *Homes* v. *Sims,* 71 Miss. 245; 2 Thompson on Trials, secs. 2245-48; *Farmer* v. *Cumb. Tel. Co.,* 76 Miss. 55; *Whitney* v. *Cook,* 53 Miss. 551; *Ill. Central R. R. Co.* v. *Boshams,* 70 Miss. 11; *Tribette* v. *Railroad Co.,* 71 Miss. 212.

And to show a further purpose of recklessness and disregard of appellant's rights in the premises, appellees turned loose a lot of negro choppers on said land to work up the trees into cross-ties and failed to offer evidence, that they were instructed not to cut and work into ties, oak trees under twelve inches at stump. Witness Title, introduced by appellants, states that in 1913, he saw a negro camp of tie cutters for appellees at work about the middle of the Bates land.

Hence the contention of appellants, that appellees have totally failed in their evidence to exonerate themselves from the allegation of wilful, reckless and knowing trespass as charged in the first count of their declaration, because of cutting and removing thirty-two white oak trees; six post oak trees, two hundred and thirteen black oak trees and eight Ash trees from appellant's land not within the call of their deed of timber sale to appellees, and without appellant's knowledge or consent for which appellants submit appellees are liable to pay appellants under the law, and case made by the evidence, the statutory penalty of fifteen dollars per tree as provided by section 4977, Code 1906.

This brief is most respectfully submitted for consideration.

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R. H. Knox, for appellee.

The evidence in this case as is clearly shown from the record fails to show at all that the Brevard-Wood Stave Company or any of its agents violated the terms of this contract in the least, by cutting any timber of any description undersize. It affirmatively shows that the appellee instructed their agents as to what timber to cut, and warned them not to cut any of the timber not embraced in the contract, and if they had cut timber not embraced in the contract, after it was shown that they directed them not to cut the same, the Brevard-Wood Stave Company would not have been liable for the statutory penalty.

Now as to value of any trees that were cut by the appellee through their agents, I will say first, that the proof was not sufficient in this case to warrant the jury in saying that appellee cut a single tree, other than those they had a right to cut. A committee of three men it seems, was sent upon this land by appellant to make observation preparatory to testifying in this case. This committee was composed of Messrs. G. W. Clark, E. S. Martin and Bud Alford, neither of whom were prepared to swear who cut the trees that showed to be under size at the time they measured the stump, which was about a year later. The most they had to say, is that they saw some cross-ties evidently refused—one still laying on the ground with a brand thereon B. W., but these witnesses admitted that the Brevard-Wood Stave Company were in the cross-tie business, and bought ties in the finished state from the public generally and branded the same, B. N. W. In fact the testimony of W. W. Naron for plaintiff is about as clear as any they had and his testimony in substance is that he lived about three-fourth of a mile from the nearest line, and that he heard people chopping in the woods up there and upon one occasion he went squirrel hunting and heard them chopping plainly, but did not ever go up near enough to recognize the

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people cutting, but does admit on cross-examination that whoever cut this timber, cut it up very high, but was not in position to say whether or not the stumps would come within appellee's contract, if they had been cut down to a customary height. He measured some stuff but couldn't say whether any of them was cut during the life of this contract.

Our contention in short is simply this that the proof in this case for the plaintiff fails to show, who cut the timber that was cut under size if any was cut; second, if it shows that we cut any at all, the jury that heard the case took all the facts and circumstances together, and gave him fifty dollars, according to the proof in this case as to the value of these little old black jack saplings; this was ample pay to him for a hundred saplings, yea two hundred, so we respectfully submit that this case should be affirmed, since it is apparent that he got more than the proof authorized.

ETHRIDGE, J., delivered the opinion of the court.

The appellants sued the appellee in an action of trespass in two counts for cutting timber off certain lands described in the declaration; one count being for statutory damages of fifteen dollars per tree, and the other count for actual damages, the actual value of the trees. The number of trees cut was two hundred and fifty-eight. The action originated from the cutting by the appellee of two hundred and fifty-eight trees under the size stipulated for in the contract. The Stave Company bought of the appellants all hickory timber eight inches and over at the stump, and all other timber of other kind twelve inches and over at the stump, on a certain body of land. The contract of sale gave it a specified time in which to move the timber. The Stave Company sent its employees upon the land in question, and these laborers cut two hundred and fifty-eight oak trees less than twelve inches in diameter at the place cut; the stumps measuring

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from eleven and one-half inches down to eight inches. The superintendent or manager of the Stave Company testified that he told his hands not to cut below twelve inches in diameter, and it was contended that the company was not responsible for the statutory damages, where the hands cut below twelve inches contrary to his orders. The plaintiff proved the cutting of the two hundred and fifty-eight trees in violation of the contract, but was not present at the time of the cutting, and was unable to disprove affirmatively the statement of the appellee's agent, the superintendent, that he told them not to cut under twelve inches in diameter.

The presumption of law is that every man intends to do what he does do, and in the absence of the proper showing of honest mistake, the defendant would be held to have willfully done what he did do. It is not sufficient to send out a bunch of laborers, with general instructions to cut only twelve inches and up; but it devolves upon the owner to exercise reasonable superintendence over the employees, to see that they cut the timber according to the contract and with due regard to the rights of the other party. This case falls within the principle of *Clay* v. *Postal Telegraph-Cable Co.*, 70 Miss. 406, 11 So. 658. In that case, in discussing the duty of the master with reference to the superintendence of the laborers, the court said. "If Fisher was negligent in sending out a large number of ordinary laborers to clear out the way, and erect its line, over a highway ten miles in length, even though he had instructed these laborers not to invade private property, the company was liable for the injury flowing from its agent's negligence. The proper inquiry was, not whether Fisher was absent superintending the removal of his camp from Jackson to Clinton, but was the sending out of a gang of irresponsible laborers, without any intelligent and controlling head, with no agent of the company to perform Fisher's duty of supervising the work, under the evidence in the case, negligence on Fisher's part, and imputable to his principal? It could not

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be contended that Fisher might have absolved his principal from all liability for trespasses done by a gang of ordinary laborers along or near to the highways in the state, beginning at the Alabama state line and ending at the Mississippi river, by simple absenting himself during the entire progress of the work, on any thought that his presence was necessary at his camp. The negligence in the case supposed would not be disputed. Whether Fisher's absence for the entire day on which this injury is alleged to have been committed, with the excuse he offered for it, disclosed his negligence, should have been presented to the jury by a proper qualification of, or addition to, the second charge of appellee."

The court having given a peremptory instruction to find against the plaintiff as to the first count, and refusing to submit the question of whether the cutting was in good faith to the jury, we think it committed error, and the judgment is reversed, and the cause remanded.

Reversed and remanded.

COUNCIL v. MURPHY.

[76 South. 553, Division B.]

BILLS AND NOTES. *Conflict in evidence. Question for jury.*

Where, in a suit on a note by the assignee thereof, the defendant maker pleaded as a set-off certain notes assigned to him by plaintiff's assignors and there was a material conflict in the evidence as to whether the notes pleaded by defendant as set-offs were assigned to him with the understanding that plaintiff's assignors would be responsible for their payment and as to whether there was a demand for payment on the makers and as to whether plaintiff promised to pay them after knowledge of the makers' default in payment. In such case a peremptory instruction should not have been given but the case should have been submitted to the jury.

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APPEAL from the circuit court of Washington county.

HON. E. E. EVERETT, Judge.

Suit by E. C. Murphy against G. G. Council. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

ETHRIDGE, J., delivered the opinion of the court.

E. C. Murphy brought suit against G. G. Council on a promissory note for five thousand four hundred seventy-eight dollars and fifty cents dated November 25, 1912, and due November 15, 1913; said note being made payable to Murphy Bros., and assigned by them to E. C. Murphy. Council pleaded a set-off to this note, alleging on the date of the making of the note sued on that Murphy Bros., the payee in the said note, for a valuable consideration indorsed to the defendant, Council, various and sundry promissory notes (seventeen in number), payable to the order of Murphy Bros., and that each and every one of the said notes were presented for payment and were dishonored, whereof the said Murphy Bros. had due notice, but did not pay the same, or any one of them, all of which occurred prior to any notice by the defendant of the assignment of the notes sued on by Murphy Bros. to the plaintiff herein, and that the defendant was entitled to set off said notes against the note sued upon. The dates, amounts, and maturity of each of the notes is set out in the plea, all of which notes, except one, were past due on the date of the giving of the note sued on, and this note was for one hundred dollars, and became due and payable five months after the 9th day of July, 1912. Copies of said notes are attached to the plea, and each of them are indorsed on the back by Murphy Bros. as follows:

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"Arcola, Miss., Nov. 25, 1912.

"For value received we hereby transfer the within note to G. G. Council.

"[Signed] MURPHY BROTHERS."

Various replications to this plea were filed by the plaintiff, and demurrers to many of them interposed, and some of them sustained. The pleadings are voluminous, but finally in substance brought down to about the following propositions: That the above indorsement was not an indorsement by which Murphy Bros. were liable as indorsers, but was a mere transfer of title; that the plaintiff was purchaser of the note sued on for value, without notice of the set-off; that the defendant did not exercise due diligence in presenting the notes for payment and giving notice thereof to Murphy Bros.; that there was no consideration for the note to support the indorsement making Murphy Bros. liable; that there was an agreed value of the notes made at the time of the indorsement; and that Council had received enough property in payment to satisfy the amount of this agreed value. These allegations of the replications are denied by the defendant, and issue joined.

It appears from the defendant's testimony that Council and Murphy had exchanged plantations, Council getting in said exchange a plantation in Washington county, Miss., and the Murphys getting plantations in Illinois; that after such exchange of plantations Murphy Bros. desired to sell to Council certain live stock, farming utensils, and other personal property appurtenant to and necessary for use on the farm, and accounts and notes due by various tenants of Murphy Bros. on account of such stock and personal property; that Council desired to retain the tenants, and would need the equipment necessary for operating the farm, and that Murphy Bros. represented that they owned the equipment and undertook to guarantee that the payment of the notes would be made; that it was understood by Council that their indorsements would make the notes good if the negroes

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did not pay the notes; that Murphy Bros. requested that no proceedings be taken against the negroes, and no effort to take from them the stock or to collect the money involved in the notes, until after the gathering season of the year 1912—said tenants and promisors on said notes used as set-off being then on the plantation engaged in gathering the crops. It further appears that about the latter part of December the agent of Council interviewed the negroes with reference to the notes and said live stock, and the negroes refused to pay the notes, claiming that they did not owe them, or that they could not get a settlement, and they refused to give up the stock on the ground that Murphy Bros. had no right or title to the stock and had no right to sell them; that the agent of Council sought Murphy Bros. about the last of December, 1912, disclosed to them the contention of the negroes and their refusal to pay the notes; and that Murphy Bros. stated that they were liable for the notes, and if the negroes did not pay them that they would be responsible; that Murphy Bros., being then engaged in moving away from the plantation, would not make a settlement at that time, but agreed to do so later, but went away, and never did in fact settle; that Council gave notice to Murphy Bros. not to assign his note, as he claimed these set-offs, and that if the note was assigned that they would be responsible to Council for said notes not paid by said negroes. Council further testified that, when the plaintiff came to see him about collecting the note in 1913, he (Council) saw the note sued on at that time, and examined the back of the note, and at that time there was no indorsement on the back thereof. He states, further, that E. C. Murphy told him that he was merely acting for Murphy Bros. as agent; that this set-off was a surprise to him, and that he would have to see Murphy Bros. before allowing it; and that he went away with the understanding that he would see Murphy Bros. and see about adjusting the matter. All this testimony on the part of Council

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and his witnesses is contradicted by Murphy and Murphy's witnesses, some of whom were makers of the notes used as a set-off; and some of the tenants testified that no demand was made for payment by Council or his agent. There is a distinct and sharp conflict in the evidence as to whether the notes pleaded as a set-off were assigned by Murphy Bros. to Council with the understanding that Murphy Bros. would be responsible for the payment of said notes, and there is a conflict as to whether there was a demand for payment on the makers of the notes used as set-off, and whether Murphy promised to pay said notes after knowledge of the default in payment.

We think the court below erred in giving the peremptory instruction to find for the plaintiff for the full amount of the note sued on, with six per cent. interest; that the questions should have been submitted to the jury under proper instructions. The plaintiff's testimony might have been accepted by the jury, or it might not. If the plaintiff's version of the facts was accepted, he would, of course, be entitled to recover. On the contrary, if the defendant's version of the transaction was believed by the jury, the defendant was entitled to be allowed the set-off, or so much thereof as the jury believed to be due and unpaid. In other words, if the testimony of Council and his witness constituted an agreed statement of facts, the court could not have decided for the plaintiff. The court should not have granted a peremptory instruction, where there is a material conflict in the evidence. Judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

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GREENWALD v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[76 South. 557, Division B.]

1. EVIDENCE. *Judicial notice. Market for blooded hunting dogs.*
The court officially knows that blue-blooded hunting dogs have a market.

2. DAMAGE. *Killing valuable dog on track. Instructions.*
In a suit for damages for the negligent killing of a blooded pointer dog, where the evidence showed that there was no local market for such dogs, the court should have instructed the jury to fix the value of the dog at such sum as the evidence showed that a man who wanted to buy such a dog would be willing to pay for same; and to aid the jury in arriving at the value of the dog, the court should permit the jury to consider the testimony as to the values of such dogs in other places, wherein the owner might find a purchaser.

APPEAL from the circuit court of Claiborne county.

HON. E. L. BRIEN, Judge.

Suit by S. Greenwald against the Yazoo & Mississippi Valley Railroad Company. From an insufficient judgment, plaintiff appeals.

The facts are fully stated in the opinion of the court.

R. B. Anderson, for appellant.

The court ruled out the testimony of Mr. Bearden as to the value of a dog, like that, in Tennessee. I think this was error because the dog could have been sold in Tennessee, and where there is no market for an article, it is going very far to say that its value in another locality is not admissible. Following that ruling by the court, the first instruction was to the effect that the value was to be determined by what the animal was worth at Pattison. I contend respectfully that this was not proper, because, since it appeared that there

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was no market at Pattison, the value at any place where the dog could have been sold was material and admissible. The rule that the local market value controls refers only to such articles as have a market value. 13 Encyc. Evidence, p. 567.

However, while I submit that the ruling out of the testimony of the witness as to the value of dogs in Tennessee like this one, or rather, of the fact that he had seen dogs not as good as this one sell for two hundred dollars or two hundred and fifty dollars in Tennesee, and the giving of the first instruction to defendant, confining the proof of value to that particular locality (Pattison) and while it is probable that the jury, in fixing the value confined themselves to the value at Pattison (as they should have done under the first instruction given the defendant), and thus reached the remarkable verdict of five dollars, was erroneous and should reverse the case; it is most earnestly contended that the proof shows a much greater liability than the above nominal sum. Surely the fact that Hynum sold two dogs for three dollars and seventy-five cents each should not fix the value of an animal Hynum had never seen and knew nothing about. Since a valuation of some two hundred and fifty dollars is placed on the dog by three witnesses for plaintiff, and a valuation of twenty-five dollars by two of defendant's witnesses (Middleton and Allen, and the only two who pretended to place any valuation on the dog), it is perfectly plain that the verdict was reached with no regard whatever as to what the proof showed.

A cow or a horse or a mule has a fixed value usually for its fitness for labor or with reference to its size or adaptability for human consumption, but a dog's value is governed almost entirely by its individual traits and usefulness for a particular purpose. The price paid to the witness, Hynum, and the ideas of Allen and Middleton, the two defense witnesses, who knew absolutely nothing about the dog in suit, could

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not properly be permitted to reduce the value of the animal, and the judgment in this case is nothing short of an arbitrary and prejudiced and capricious dictum of the particular jury which tried the case.

It is respectfully submitted that in all justice a new trial should be had.

Mayes, Wells, May & Sanders, for appellee.

It is a well established rule that a verdict of a jury will not be disturbed unless it is manifest from the whole record that it was clearly wrong. *Kelly* v. *Miller,* 39 Miss. 17; *N. O. R. Co.* v. *Hurst,* 36 Miss. 660; *N. O. R. Co.* v. *Statham,* 42 Miss. 608; *Hill* v. *Railway,* 76 Miss. 587; *Railroad Co.* v. *Hurst,* 36 Miss. 660, 74 Am. Dec. 785; *Railroad Co.* v. *Whitfield,* 44 Miss. 466, 7 Am. Rep. 699; *Railroad Co.* v. *Caruth,* 51 Miss. 77.

If a verdict is supported by evidence, and the court cannot say the jury was unwarranted in reaching its conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court. *Y. & C. R. Co.* v. *Williams,* 67 Miss. 18; *Kansas City, etc., R. Co.* v. *Cantrell,* 70 Miss. 329; *Woodem* v. *Owens,* 12 So. (Miss.) 207; *Waul* v. *Kirkman,* 13 S. & M. (Miss.) 599.

In determining the amount of recovery for the loss of a dog which has no market value, the facts and circumstances of the particular case in hand are important, and the jury in this case were the sole judges of the value. The dog had no special or pecuniary value to the owner manifestly as he never hunted with it but a few times, and it was valuable, if at all, for no other purpose. It performed no special services for the owner and was wild and insufficiently trained, and there was no measure of damages in the case except the exercise of common sense of the jury with the facts and circumstances before them. The verdict should not be disturbed, and the judgment of the lower court should be affirmed.

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COOK, P. J., delivered the opinion of the court.

Appellant sued the appellee for the value of a pointer dog killed by one of the locomotives of appellee near the depot at Pattison, in Claiborne county. The facts as disclosed by the record, are that the dog got on the track from one hundred to one hundred fifty yards in front of the approaching locomotive, and then ran slowly down the track until it was overtaken by the locomotive and killed. It is evident that the engineer did not see the dog at all, and that he has no recollection as to what he was doing at the time; he, manifestly, was testifying about his custom, and had no independent recollection of this occasion. Some effort was made to have the engineer testify that he did not see the dog because he had his eyes on the semaphore, but this was without results.

All of the pertinent evidence fixed the value of the dog at from two hundred dollars to two hundred and fifty dollars—that is to say, the witnesses who knew the qualities and breeding of the dog testified that way. The evidence shows that there was no market for dogs of this kind in Pattison, and the court by instructions limited the finding to the market value of dogs in Pattison, and excluded evidence offered of the value of dogs of this kind in adjoining states. It being that Pattison was not a dog market, and that pointer dogs had no market there, the jury followed the instructions of the court by fixing the value of the dog at the nominal sum of $5. There are, perhaps, towns even in this state wherein there is no market for cotton, and in a suit involving the value of a bale of cotton, would the court be justified in instructing the jury that in determining the value of a bale of cotton the jury were confined to the market value in a town where there was no market for cotton?

We think the court may judicially know that blue-blooded hunting dogs have a market, and in this case

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the court should have instructed the jury to fix the value of the dog in question at such sum as the evidence shows that a man who wanted to buy a dog like this one would be willing to pay for same; and to aid the jury in arriving at the value of the dog in this case, the court should have permitted the jury to consider the testimony as to the value of such dogs in other places, wherein the owner might find a purchaser.

Reversed and remanded.

THOMAS v. WEEKS.

[76 South. 559, Division B.]

DAMAGES. *Medical attention. Evidence. Instruction.*

In a suit for damages for personal injury where the evidence showed that plaintiff received medical attention and that her husband bought some medicine for her, an instruction for the plaintiff allowing the jury to take into consideration the expense of medical attention as an element of damages, was not reversible error, although the doctor attending her testified that he had not entered any charge for his service because the husband, though willing, was unable to pay for same.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Suit by Mrs. J. H. Weeks against J. S. Thomas. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Parker & Robinson, for appellant.

We now call the court's special attention to instruction No. 4, which states particularly the items which the jury may consider in arriving at their verdict if they find for the plaintiff.

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In this instruction the court instructs the jury that it may "take into consideration the loss of time that she lost as the proximate cause of said injury, if they believe she lost any time on account of said injury; also the trouble and expense that has been incurred on account of said injury, if they believe there was any, such as medical bills or wages of parties she had to employ to work for her, if they believe any such occurred on account of said injuries."

We submit that this instruction was erroneous as appellee had not paid out one cent for medical bills, nor for people to work in her place, or for doctor's bills, or for any other thing; still the jury was told to include this in their facts in making up the amount of their verdict, and while the jury was told to include such, if any such expense had been incurred, and was told to include all expense which had been incurred by anybody, and the evidence shows that if any expense had been incurred, it had been incurred by J. H. Weeks, the husband of plaintiff, and did not confine them to the money she had spent.

The verdict in this case shows that the jury did not place a great deal of confidence in the injury, and for that reason we suggest that this expense which the defendant was held to pay erroneously might have formed a great portion of the judgment.

We respectfully submit that the judgment of the court below should be reversed.

J. I. Ballenger, for appellee.

J. I. Ballenger, attorney for appellee in this case here submits the following as his brief: Would state that, after reading the brief of appellant, I do not think it necessary to file any brief: First, because attorney for appellant admits (not by words), but by his argument, that the evidence in this case fully warrants the verdict; second, he admits by argument that

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the verdict is not excessive; the only real question that he raises in the case at all is to a part of the instruction No. 4 asked for by plaintiff and given by the court.

Now the instruction is clearly the law as has been passed upon by this court in many cases, so it is useless to refer to authorities. But if it was a little erroneous in wording, the facts in the case are so overwhelming for the appellee that the court would be bound to let the facts govern in place of an instruction that could do no harm; that if it should be erroneous in some little immaterial part it would not be reversible. So I deem it unnecessary to attempt to file any further brief in this case, more than to say that after reading appellant's brief, if you think it could be necessary to read the evidence in the case, you will find that the evidence overwhelmingly supports the verdict and the injuries proven would have supported a much larger one. Further, of course the appellant, J. S. Thomas and the party that was in the automobile with him was Robert Clark who is kin to appellant, were interested witnesses in this case; so was appellee, Mrs. J. H. Weeks and her husband, J. H. Weeks, but you will note that there were three eye-witnesses to the actual collision in this case, to-wit; H. J. Walker, Quint Simpson and H. H. Murry. If you should think necessary, read their evidence.

Therefore I ask that this case be affirmed by this honorable court and judgment be given for the appellee for the amount recovered in the court below, including interest and damages allowed in such cases.

COOK, P. J., delivered the opinion of the court.

The appellee, plaintiff below, sued appellant for damages inflicted upon her by the negligence of the appellant. The case went to the jury, and a verdict was returned against the defendant for one hundred and fifty dollars. The evidence in support of the averments

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of the declaration, if believed, clearly shows that defendant was grossly negligent, and that plaintiff was painfully and seriously injured in consequence of defendant's negligence.

Briefly stated, plaintiff proved that she was peacefully driving along the public road, in the company of her husband—carefully hugging the extreme right-hand side; that defendant, in his automobile, was coming towards her; that instead of driving to the right, defendant turned his machine to the left and came in collision with the buggy in which plaintiff was seated, the force of the impact threw her out of the buggy and injured her as above stated. On the other hand, defendant and his witnesses testified that he did not run into the buggy at all; that plaintiff and her husband were driving along the highway, with the reins thrown over the dashboard, while they fortified themselves with "Rock and Rye;" that before he reached them, he discovered their situation and stopped his machine on the right-hand side of the road; that while his machine was at a standstill, the horse hitched to plaintiff's buggy, uncontrolled by the occupants of the buggy, decided to cross over to defendant's side of the road, and in the execution of this maneuver the ends of the buggy shafts struck the side and rear of the automobile, the force of the impact stripping the harness from the horse, and catapulting the plaintiff into the air and to the earth below.

If the jury accepted plaintiff's version of the facts, and they did, the amount of the verdict was very conservative.

It is contended here that the court erred in its instructions to the jury. The court instructed the jury as follows:

"The court instructs the jury for the plaintiff that if they find for the plaintiff, they should, in estimating her damages, take in consideration the amount of suffering that she suffered, by bodily pain or otherwise,

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proximately caused by said injury, the amount of permanent injuries, if they believe she was permanently injured, the amount of physical suffering that she is likely to undergo in the future, if any, as the proximate result of said injury, the amount of mental suffering, if they believe that she suffered mentally, proximately caused by said injury, if they believe that she was so injured and suffered. Take in consideration the loss of time that she lost, as the proximate cause of said injury, if they believe that she lost any time on account of said injury, also the trouble and expense that has been incurred on account of said injury, if they believe there was any, such as medical bills or wages of parties she had to employ to work for her if they believe any such occurred on account of said injuries, and award her such damages as they believe from the evidence she is entitled to, to compensate her for all pain and suffering that she has suffered on account of said injuries, both physically and mentally, and for all money she has expended on account of said injuries."

It is contended that the evidence disclosed that plaintiff had not paid any bills for medicine or medical services, and the instruction was therefore reversible error. The evidence does show that plaintiff received medical attention, and that her husband bought some medicine for her. The physician in charge, however, stated that he had not entered any charge for his services because the husband of plaintiff, he believed, would never be able to pay for his services; that he was willing, but not able.

An inspection of this record convinces us that defendant cannot justly complain of the amount of the verdict. The jury did not believe his version of the facts, and did believe the version of plaintiff, and it is quite clear that the errors in the instruction, if any there be, were entirely innocuous.

Affirmed.

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RUNNELS ET AL., *v.* JAMES.

[76 South. 566, Division B.]

PRINCIPAL AND SURETY. *Release of sureties. Alteration of instruments.* Where a promissory note with a surety, executed for two hundred and twenty dollars, twenty dollars of which being for illegal interest, was changed by the principals with the consent of the payee to two hundred dollars without the knowledge of the surety, in such case the surety was released but the principals were still bound.

APPEAL from the circuit court of Forest county.

HON. P. B. JOHNSON, Judge.

Suit by Charlie James against J. P. Runnels and others. Judgment for plaintiff against all the defendants, which on motion for new trial was set aside as to surety, and principals appeal.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellants.

We cite: 9 S. & M., page 375. This is an old case, and the principle announced therein has never been overruled, so far as we are able to find. The evidence shows throughout that the note was changed for the reasons set forth herein, so the question as to whether or not the note had been altered, or whether or not the alteration was material is not open to discussion. It is admitted by all parties to the litigation; the only question being: who was responsible for the alteration? We submit that the plaintiff was not entitled to the peremptory instruction against the two defendants, Runnels and McLemore. They both emphatically denied that they consented to said alteration, and that they, in effect, protested against said change, by informing the plaintiff, James, that by making the alteration in the

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note, it would destroy its legal effect, and that over such protest, James directed Runnels to make the change in the note, and this while neither of the Lees were present. If this alteration was made at the instance of James, the plaintiff, without Runnels and McLemore's consent, as they testified, then the note was absolutely void as to both of these defendants. This was a question to be determined solely and exclusively by the jury. It is a well-settled principle of law, that the court, upon a question of conflict in the testimony upon material issues, cannot invade the province of the jury and decide for them which theory they shall adopt. If the jury had believed, as we believe they would, that the alteration in the note was made without the consent of these two defendants, then they would have been entitled to a verdict at the hands of the jury and we insist that the jury would have adopted this theory for the reason that they are corroborated by every circumstance connected with the transaction, and the plaintiff's testimony is conflicting from beginning to end.

We submit that the case as to these two defendants simply resolves itself into the question: Did McLemore and Runnels consent to the alteration of the note? The testimony is in conflict upon this point, however, being very timidly disputed by the plaintiff, and this was a question of fact for the jury, purely and simply, and the court erred in granting the peremptory instruction against the defendants, appellants herein. We submit, further, however, that the defendants were entitled to the peremptory instruction asked by them. The note showed upon its face that it had been materially altered and this being true, the burden was on the plaintiff to show that the alteration was lawful. This he wholly failed to do. The plaintiff himself, as we understand the record, does not say who changed the note, but leaves the question in doubt, and the most that could be said would be that his testimony would leave an inference that these two defendants were responsible for

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the change or alteration. This does not meet the burden placed upon him by the law, when it is admitted by all the parties that the note had been materially altered.

"The general presumption indulged in favor of fairness and against fraud in transactions, does not apply when negotiable paper appears upon its face to have been materially altered. In that case, the holder must show that it was done under circumstances legal and proper." *Commercial, etc., Bank* v. *Lum,* 7 How. 414; *Ellison* v. *Mobile, etc., R. R. Co.,* 36 Miss., 572; *Croft* v. *White,* 36 Miss., 455. "And proof of the signatures on such note is insufficient." 51 So. 714.

And we submit that the plaintiff's explanation must be clear and convincing, and establishing, at least by a preponderance of the testimony, that the alteration was lawfully made. *Everman* v. *Robb,* 52 Miss. 653. Upon the proposition that the peremptory instruction should have been granted to the defendants, N. N. Lee and R. G. Lee we cite, 6 How. 65.

Holding emphatically that material alterations without the consent of the sureties discharged all such parties, for the reasons set forth herein, we respectfully submit that the case should be reversed and judgment entered that, or at least reversed and cause remanded for a new trial, as to McLemore and Runnels, and the order setting aside the judgment as to the defendants, R. G. Lee and N. N. Lee, made final.

A. T. L. Watkins, for appellee.

The only question presented by this cause, is, does the note as sued on, represent the contract as made and intended to be made. Appellants are estopped to urge on this honorable court, that they were conniving to make a void contract, to defraud appellee, cross-appellant, out of his money (receipt of which is acknowledged); the record shows conclusively the mistake, as to the legal rate of interest under the statute.

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The record disclosed that appellee, did not correct the note, but insisted on appellant's correcting it, according to promise, having informed McLemore, the only one of the joint makers present when the money was paid, that he could not accept the note in that form, the note was manifestly executory at that date. For citations, touching upon the point, see *McRaven* v. *Crisler*, 53 Miss. 542; *Foote* v. *Hambrick*, 70 Miss. 157, Am. St. 631. See 57 So. 700; 69 So. 894; 65 So. 321.

We submit that a correction, which was to their interest, is not a material alteration within the meaning and intention of our law, if a credit had been found on the note, of which none of the debtors knew anything, it would not vitiate the note, the alteration must be, at least, detrimental to the party complaining; must be fraudulent and to the injury of some one. Merely clerical errors and their correction are not included within the meaning and intent of our law.

We respectfully submit that the cause should be affirmed on direct appeal, reversed on cross-appeal and judgment entered, in this court against all of the defendants, for principal, interest, attorney's fees, with appellate damages, as provided by statute.

COOK, P. J., delivered the opinion of the court.

The appellants here, defendants below, were sued upon a promissory note, as set forth in the declaration dated January 3, 1914, for the principal sum of two hundred dollars, with eight per cent. interest from date until paid. The defendants below appellants here, pleaded the general issue, and also filed a special plea, setting up the fact that there had been a material alteration made in the note sued upon by the plaintiff, James, without their knowledge and consent and that the note for this reason was void, and the plaintiff could not maintain his action. A peremptory instruction was granted by the court in favor of the plaintiff against all the de-

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fendants for the full sum sued for, principal, interest, and attorney's fees. Upon motion for a new trial, the court set the judgment aside as to two of the defendants, N. N. Lee and R. G. Lee, but overruled the motion as to McLemore and Runnels, the other two defendants.

The record is conclusive upon the proposition that the note sued upon had been altered, and that this alteration was apparent upon the face of the note. The plaintiff admitted that when he received the note it called for two hundred and twenty dollars principal, and provided for eight per cent. interest after maturity, and that the note was altered and changed so as to read for two hundred dollars, principal, with eight per cent. interest after date. He admits that twenty dollars was added to the two hundred dollars as interest in advance for one year at ten per cent. per annum. He admits that he received the note, and had possession of the same, before and at the time he gave the check to McLemore for two hundred dollars the amount of money actually loaned by him to McLemore. James, the plaintiff below, claimed, however, that he did not receive the note as security for this debt, and at one time makes the statement that he let McLemore have the money on his word and honor. He (James) denies the alteration of the note himself, but contends that McLemire and Runnels made the change. He admits that neither of the Lees were present at the time the change or alteration of the note was made, and that neither knew anything about it.

There is no dispute between the plaintiff and the defendants as to the fact that the note was actually materially altered. There was a conflict in the testimony as to who altered the note. Runnels and McLemore both testified that some weeks, or perhaps a month or so, after the note had been signed and delivered to the plaintiff, the plaintiff brought the note to them at Runnels' store, and requested that the note be changed so as to make the face of the note for two hundred dollars

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principal and eight per cent. after date. Runnels and McLemore testified that they told James at the time that the note could not lawfully be changed or altered, and that to do so would vitiate the note, or words to that effect, and that he should have a new note. They testified that neither of them consented to the change, but that James, the plaintiff, requested Runnels to make the change in the note, as alleged in defendants' plea, and as shown by the testimony; Runnels warning the plaintiff that such change was not lawful. They testified, as did all the defendants, that the note was for two hundred and twenty dollars, and that twenty dollars of this sum was added as interest for one year at ten per cent.; that they knew at the time the note was signed that interest had been computed on the two hundred dollars at ten per cent. for one year, and had been added to the principal of two hundred dollars in the note; that the same was not collectible. There is seemingly no conflict in the testimony for the plaintiff or defendants, except that between James, the plaintiff, and Runnels and McLemore, defendants, against whom the judgment now stands, and that is the conflict, as stated before, as to who altered the note, or at whose instance it was done; McLemore and Runnels having emphatically denied that they consented to the change, and that they told James at the time that it would make the note void or illegal, and James contending that they made it of their own accord.

We have assumed, for the purpose of this appeal, the facts to be as appellant states them in the brief of his counsel. It will be observed that the changes in the note sued on were made by appellants. The only conflict in the evidence about the change is that appellee testified that, when he discovered what he terms the error in the original note as written he refused to accept same in the form in which it was written, and so stated to the principal makers of the note; that the change was made by appellants without any objection. This, of course,

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released the sureties, and the trial court so held; it appearing that the sureties were not parties to this change, and knew nothing about the change, until the note was presented to them for payment. The case of *Wilson* v. *Henderson,* 9 Smedes & M. 375, 48 Am. Dec. 716, clearly demonstrates that the rule invoked by appellants is not a hard and fast one—that it is not always literally enforced. Judge SHARKEY, speaking for the court, said:

"The proposition contained in this part of the charge is too broad in another respect. The plaintiff was at liberty to make any alteration which Sanders authorized; but the charge is without qualification. It assumes that every alteration would avoid the note, even though Sanders . . . directed it."

We think that Runnels was wrong when he told James that it would be unlawful to alter the note. His statement was too broad. It was perfectly proper to change the note with the consent of the makers, and what Mr. Runnels thought about the law is immaterial. Runnels not only consented to the change, but also made the change. They got the money, but they insist that there was a material alteration of the instrument evidencing the debt, so as to render it not collectible; that one of them made the alteration in the presence of the other. This much is sure. True, Runnels expounded the law on the subject, according to his lights; but, in our opinion, his version of the law was unsound. The appellee gained no advantage by the alteration—he was not guilty of any fraud. He merely seeks to recover the money advanced by him to appellants, and while it was the opinion of appellants that the alteration, in itself, and even with their consent and active agency in the making of the alteration, would destroy appellee's right to recover under the altered instrument, we are nevertheless of opinion that the trial judge properly instructed the jury to find for the plaintiff.

Affirmed.

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BETTER ET AL. v. HIRSCH ET AL.

[76 South. 555, Division B.]

1. WILLS. *Execution. Signature. Statutes.*
A will was properly executed under Code 1906, section 5078, where a testatrix went to a bank and procured a will she had previously executed from among her private papers, re-wrote it in her own handwriting, beginning: "I, Mrs. Mollie Herman of Warren County, Mississippi, of sound mind and memory make this my last will," but did not sign it at the end of the will, and sent for the two subscribing witnesses, who attested the document in her presence, at her request, and thereupon the old will was destroyed; such circumstances showing that the writing of testatrix's name in the body of the will was intended as her signature to the same.

2. SAME.
In such case it was not necessary for the attesting witnesses to sign the will in the presence of each other, since the statute does not so require.

3. WILLS. *Holographic wills. Subscribed.*
Where a will is probated as a holographic will, it must be not only written, but "subscribed" by the testator under Code 1906, section 5078, so providing.

4. WILLS. *Signature in body of will. Intention of testator.*
Whether the signature written in the body of a will in any case is the completed act or not, depends on the intention of the testator, and may be regarded as a question of fact to be answered and controlled by the testimony in each case.

5. WILLS. *Statutes prescribing essentials of execution. Construction.*
Where the facts show an effort by the testator in good faith to execute a will, there should be no technical and hard rules of construction of the statute prescribing the essentials for the execution of a will, in order to defeat her purpose.

APPEAL from the chancery court of Warren county.
HON. E. N. THOMAS, Chancellor.

Suit by Mrs. Phillip Better and others against Frank Hirsch, executor, and others. From a judgment for defendants, plaintiff appeals.

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Appellants, who were certain heirs at law of Mrs. Mollie Hermann, filed a suit in the chancery court of Warren county, the purpose of which was to set aside and nullify the will of the said Mrs. Hermann, who died a widow without children, leaving appellants and others as her heirs at law. Some time previous to her death she had had a will drawn by her attorney, but a few days before her death she took this will from the bank, where it had been deposited for safekeeping, and rewrote it in her own handwriting. On the day of her death she added a concluding paragraph and sent for the subscribing witnesses, who signed the will in her presence, but not in the presence of each other. Mrs. Hermann did not subscribe her name at the end of the will, but wrote the entire will in her own handwriting, the opening paragraph of which is:

"I, Mrs. Mollie Hermann, of Warren county, Mississippi, of sound mind and memory, make this my last will."

Shortly after the attestation of the will by the two subscribing witnesses, Mrs. Hermann died. Subsequently this suit was filed against the executor and certain beneficiaries under the will, which had been duly probated. The contestants set up the following grounds for avoiding the alleged will:

"(1) That the paper, though admitted to probate in common form, is not the true last will and testament of decedent. (2) That the said writing was not executed as required by section 5078 of the Mississippi Code of 1906, in that it was not signed or subscribed by the decedent. (3) That the writing is too vague, indefinite, uncertain, and contradictory, both as to bequests and beneficiaries, to be legally effective as a last will and testament. (4) That the said decedent was mentally incapable of making a will at the time the writing purports to have been excuted. (5) That the decedent had for many years entertained towards complainants violent and absurd prejudices, based on misinformation and

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mental delusions, and that the paper in question was the result of such insane delusions."

Section 5078 of the Code is as follows:

"Every person aged twenty-one years, male or female, married or unmarried, being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath or at the time of his or her death, shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of any description whatever, so as such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence, and by his or her express direction; and, moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two or more credible witnesses in the presence of the testator or testatrix."

J. C. Bryson and *A. M. Klein,* for appellant.

We submit that the pleadings raise, and the testimony affirmatively establishes, the following issues: First, that the paper in question was never completed and that Mrs. Mollie Hermann died leaving it in an unfinished and inchoate state; second, the signature of the decedent appearing near the beginning of the instrument was not made in final execution of the instrument as required by section 5078, Mississippi Code, 1906, and was not a signing of the instrument in legal contemplation and effect; third, that the decedent while working at the said instrument had become so weakened by sickness, the near approach of death, and the mental effect of writing as to become incapable of knowing what she was about and of comprehending the nature of the work she was attempting to perform and to bear in memory the property she possessed or the persons on whom she

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desired to bestow it; fourth, that the paper is not enforceable as to a holographic will because, in addition to the grounds against it as an attested will, it was not subscribed by the decedent as required by statute.

As to failure to complete and sign instrument: The first and second proposition set out above are so closely connected in fact and legal effect that we deem it best to present them together. Let us first consider what the statute contemplates by requiring that the instrument "be signed by the testator."

Mr. Webster defines the transitive verb "signed" as "third, to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting;" and the intransitive verb "sign" he defines as "third, to write one's name as a token of assent, responsibility or obligation."

Under these definitions "to sign" is the act of giving vitality to an instrument by the writing of one's name or having it written with the conscious purpose of vitalizing or becoming bound by the instrument of writing. It is immaterial where the signature may be placed on the paper whether above, below, or in the body of the instrument, but it is essential that wherever it may be placed, it shall be done with the conscious purpose of giving effect to the writing. *Barksdale* v. *Bullington,* 69 So. 891; *Board of Trustees* v. *Campbell,* 48 La. Ann. 1543, 21 So. 184; *Knox Estate,* 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 A. St. R. 768; *Mills* v. *Howard,* 2 N. D. 30, 49 N. W. 413; *Sheehan* v. *Kearney,* 82 Miss. 688, 21 So. 41, 35 L. R. A. 102; *Plate's Estate,* 148 Pa. 5057, 23 Atl. 1038, 33 Am. St. Rep. 805; 36 Enc. of Law & Prop., 446-48; *Armstrong* v. *Walton,* 105 Miss. 337, 62 So. 173; *Lampkin* v. *State,* 105 Ala. 1, 16 So. 575; *In re Camp's Estate,* 134 Cal. 233, 66 Pac. 227; *Cunningham* v. *Hawkins,* 163 Mich. 317, 128 N. W. 223; *Catlett* v. *Catlett,* 55 Mo. 33, 43 La. Ann. 310, 26 Am. St. Rep. 183; 30 Enc. of Law. 582; 40 Cyc. 1104-5; *Merritt* v. *Clasin,* (N. Y.), 12 Johns. 102, 7 Dec. 286;

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Affirmed, 14 Johns. 484; *Lawson* v. *Dawson,* 21 Tex. Civ. App. 316, 53 S. W. 64; 1 Jarman, Wills, 70; *Roy* v. *Roy,* 16 Gratt. (Va.), 418, 84 Dec. 698; *Ramsey* v. *Ramsey,* 13 Gratt. (Va.), 664; 70 Dec. 438; *Waller* v. *Waller,* 1 Gratt. 454, 42 Am. Dec. 565; *Ramsey* v. *Ramsey,* 13 Gratt. 664, 70 Dec. 438; *Plate's Estate,* 148 Pa. St. 55; 33 Am. St. Rep. 805; *Booth* v. *Booth,* 127 N. Y. 108, 24 Am. St. Rep. 429; *Estate of Seaman,* 146 Cal. 455, 106 Am. St. Rep. 53; *Matter of Andrews,* 162 N. Y. 1, 76 Am. St. Rep. 294.

As to lack of mental capacity to make a will: The oral testimony is negative as to want of mental capacity in Mrs. Hermann to execute a valid will. On this point we must therefore look alone to the instrument itself for evidence. Indeed it seems to us, and we submit to the court, that there can be no better evidence offered as to mental capacity than one's own composition.

"The character of the provisions, however, as being just or unjust, reasonable or unreasonable, may be considered by the jury as tending to throw light on the capacity of the testator. 28 Ency. of Law (2 Ed.), 106; *Leach* v. *Burr,* 188 U. S. 510; *Couch* v. *Couch,* 7 Ala. 519, 42 D. 602; *Eastis* v. *Montgomery,* 95 Ala. 486, 36 St. 227; *Knox* v. *Knox,* 95 Ala. 493, 26 St. 235; *Crandall's Appeal,* 63 Conn. 365, 38 St. 375; *Manatt* v. *Scott,* 106 Iowa, 203, 68 St. 293; *Davis* v. *Calvert* (Md. 25 D.), 282; *Rivard* v. *Rivard,* 109 Mich. 98, 63 St. 566; *Hammond* v. *Dike,* 42 Minn. 273, 18 St. 503.

As to the requisite degree of mental capacity we cite the following additional authorities: 28 Enc. (2 Ed.), 71-73, 86; *Brock* v. *Luckett* (Miss.), 4 H. 459; *Manatt* v. *Scott,* 106 Iowa, 203, 68 St. 293; *Campbell* v. *Campbell,* 130 Ill. 466.

As to validity of holographic will: The testimony shows that the alleged will was wholly in the handwriting of Mrs. Hermann (except the signature of the witnesses) and this raises the question as to whether

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it may stand in any better light before the court by reason of that fact.

The statutory requirement for holographic wills is the same as for attested wills except holographic wills are required to be altogether in the testator's handwriting and to be subscribed, while attested wills are required to be witnessed. All the other legal tests and requirements are identical.

Failure to complete, failure to sign, and lack of mental capacity are as fatal in one case as the other. It follows that if our argument on the failure or execution as to an attested will is sufficient to avoid the instrument as an attested will, it must be sufficient to avoid the instrument as a holographic will.

In addition the paper is void considered as an attempted holographie will, because it is not subscribed by the testator and because it is attested by the witnesses in their own handwriting.

McLaurin & Arminstead, for appellee.

It is only necessary, in our judgment, to examine the question of whether or not this will was executed in compliance with the statute of Mississippi in reference to who may execute a will, as provided by section 5078 of the Code of 1906. The court on examination of this section, will observe that it does not require that the witness of the will shall sign the same in the presence of each other, but only that the witnesses shall sign the will in the presence of the testator or testatrix, as was done in this case. Neither is it necessary that the witness shall see the testator sign the will. *Miller* v. *Miller,* 96 Miss. 526. The above statute provides two way for executing wills. One is that the will may be wholly written and "subscribed" by the testator or testatrix; (2) the will may be prepared by another person for the testator or testatrix. The question involved in this case, is what constitutes a

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legal signing of the will under this section? The court will bear in mind that this will was wholly written by the testatrix, and while not "subscribed" by her, she began the will in the first paragraph in her own handwriting with these words: "I, Mrs. Mollie Hermann, of Warren County, Mississippi, of sound mind and memory, make this my last will." It is respectfully submitted that this is a sufficient "signing" of the will under section 5078 of the Code of 1906, and that this case is controlled by the case of *Armstrong* v. *Walton,* 105 Miss. 337-358.

This identical point was passed on by the Texas court of appeals in the case of *Lawson et al.* v. *Dawson's Estate,* 53 S. W. 46, 29 Car. 2, ch. 3, sec. 19.

It certainly needs no authority to sustain the position that the court will seek to uphold the will if possible, where it violates no rule of public policy or positive law, and not to strike it down. 40 Cyc. 1382; *Lum* v. *Lasch,* 93 Miss. 81.

Discussion of authorities cited by counsel for appellant. Many of the authorities cited by counsel for appellant will be found in the brief for appellee in the case of *Armstrong* v. *Walton,* 105 Miss. 337, *et seq.,* and not followed, viz.: The case of *Ramsey,* 13 Gratt. (Va.), 644. The matter of *Booth's Will,* 127 N. Y. 109. Both of these cases also, were cases of holographic wills, where the statute required the will to be "subscribed." So, also, was the case of *Succession of Armant,* 43 La. Ann. 314, 26 A. S. R. 183, referred to on page 23 of appellant's brief, a case of an holographic will, and has no application here. This case is discussed in the case of *Baker* v. *Brown,* 83 Miss. 793-796-797.

This case cited on page 25 of appellant's brief, of *Merritt* v. *Classon* (New York), 12 Johns. 102; 7 Am. Dec. 286, was a question involving a sufficient note or memorandum for a sale of rye to comply with the statute of frauds, and has no application to this case whatever. *Lawson* v. *Dawson,* 53 S. W. 64. We have

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previously discussed in this brief as a case in point in support of this will, *Roy* v. *Roy,* 16 Gratt. (Va.), 418, 84 Am. Dec. 688, and *Waller* v. *Waller,* 1 Gratt. (Va.), 454, 42 Am. Dec. 464, as well as the case above referred to, were holographic wills, and have no application here.

The case of *Plate's Estate,* 148 Penn. St. 55, 33 A. S. R. 805, page 26, of appellant's brief has no application to this case because in that case a will was prepared by a third person and presented to the testator to sign, which he delayed until he was unable to write, and the court held that the signature was not sufficient.

None of the authorities, we submit, on the question of the proper execution of this will cited by counsel for appellant are in point, as they deal mostly with holographic wills or wills prepared by third persons and presented to the testator to sign, whereas in this case the testatrix wrote her will, signing her own name with her own handwriting in the first paragraph, and had it attested by two witnesses, as, provided by the statute, and under this state of facts we respectfully submit that the case is controlled by the case of *Armstrong* v. *Walton,* 105 Miss. 237, above cited, and authorities in line with this case.

STEVENS, J., delivered the opinion of the court.

The facts, as we interpret them, bring this case within the ruling of *Sheehan et al.* v. *Kearney et al.,* 82 Miss. 688, 21 So. 41, 35 L. R. A. 102, and *Armstrong* v. *Walton,* 105 Miss. 337, 62 So. 173, 46 L. R. A. (N. S.) 552, Ann. Cas. 1916E, 137, and it follows that the decree of the learned chancellor upholding the will of Mrs. Hermann must be affirmed.

The very illuminating opinion of this court, by REED, J., in the Armstrong Case, and the authorities there referred to with aproval, make certain the conclusion we must reach. The present case cannot be differen-

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tiated from the Armstrong Case. There our court observed:

"The Mississippi statute does not state where the signature of a testator to a will shall be located. It does not say that the will shall be signed or subscribed at the end thereof. As the statute is silent as to the place of signature, and merely provides that the will shall be in writing and signed, we believe the rule that it is immaterial where the signature of the testator should be placed on the instrument should be followed in this state."

The record before us shows conclusively that Mrs. Mollie Hermann, a widow, without children, intended to leave a will. It is fairly inferable from the testimony that she not only had drafted more than one will at different times, but that she was rather fond of talking about her will and making reference thereto. It appears that on Thursday, about April 1, 1915, a will which she had previously executed was then in a Vicksburg bank amongst her private papers. On Thursday afternoon she went to the bank, procured her will, and in her own handwriting rewrote it. She wrote all of it on this Thursday afternoon, except the concluding paragraph. This concluding paragraph she added to the will on the following Sunday morning, the day of her death. When she concluded the will on Sunday, she voluntarily gave expression to her desire to have the will signed, and herself sent for the two subscribing witnesses, Mr. C. R. Manheimer and Mr. Bernard Feld, who attested the document. It appears that these witnesses came to Mrs. Hermann's room and in her presence witnessed the will, at her request. Upon doing this, the testatrix directed Mrs. Lowenthal to throw the old will into the fire. It is true that the witnesses did not sign the will in the presence of each other; but they did sign it in the presence of the testatrix and at the request of the testatrix. There is a general belief amongst many laymen and some lawyers

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that a will must be signed by the witnesses in the presence of each other; but the statute does not so provide.

The will in the present case is not probated as a holographic will. A holographic will would have to be "subscribed" by the testatrix. Our court has followed those authorities which make a distinction between the words "signed" and "subscribed." Here the testatrix, not only wrote her own name in the caption of the will, but wrote every bit of the will itself, and we cannot escape the conclusion that, when she had the subscribing witnesses to come before her and affix their signatures, she thought the execution of her will was complete. She died under the firm conviction that her will was duly executed. The fact that she wrote the will herself, including her own name in the body of the document, is at least a circumstance to show that the writing of her name in the will was intended, not only as words of description, but also to identify the document and to operate as a lawful signature.

Whether the signature written in the body of a will in any case is the completed act or not, depends, of course, on the intention of the testatrix, and may be regarded as a question of fact, to be answered and controlled by the testimony in each case. Here all the attendant circumstances support the will as one duly executed in accordance with the provisions of our statute.

Where the facts show an effort by the testatrix in good faith to execute a will, there should be no technical and hard rules of construction. As stated by Judge WHITEFIELD in *Sheehan* v. *Kearney, supra*:

"Any signature or mark signed by the testator, or by another in his presence and at his express direction, to the will, as and for his completed signature, and ac-

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knowledged and adopted by him as such at the time, in the presence of the subscribing witnesses, is a sufficient signing within the meaning of" our statute.

And again: "It is enough that what he writes is intended for and adopted as his complete signature."

In the present case the testatrix wrote with her own hand this clause:

"I, Mrs. Mollie Hermann, of Warren county, Mississippi, of sound mind and memory, make this my last will."

If she had thought it necessary to write her name at the end of the will, she could and would have done so. It is inconceivable that she would take the will, and add a concluding paragraph with her own hand, openly declare that she was making her last will, and voluntarily call for and secure the presence and signatures of witnesses, unless she firmly believed that all legal requirements had been complied with.

The fact that she died in about thirty minutes of the execution of this will is not sufficient to impeach the document. She made detailed and specific disposition of her property, including her "clothes." In fact, the learned counsel for apellants practically concede the charges of mental incapacity and undue influence are not supported by the testimony, and that the single issue is the one bringing into question the due signing or execution of the instrument as required by section 5078, Code of 1906.

Affirmed.

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COLUMBIA STAR MILLING CO. v. BRAND.

[76 South. 557, Division A.]

1. JUDGMENT. *Process to support. Publication. Personal judgment.* No personal judgment can be entered against a foreign corporation by publication of process only.

2. CORPORATIONS. *Service on foreign corporation. Immediate mailing of registered copy. Statute.*

Where in a suit against a foreign corporation, service of process on an agent of the corporation was made on September 6, 1915, but a copy of the process was not mailed to the corporation by registered letter at its home office until December 30, 1915, the summons calling for the appearance of the corporation in court at rules September 13th, there was no compliance with Code 1906, section 920, providing that it shall be the duty of the clerk immediately to mail a copy of the process to the home office of the corporation by registered letter.

3. SAME.

In such case the summons was *functus officio*, its return day having passed, the statute was not complied with, in that the copy was not immediately mailed and this is a necessary part of the service of summons in order to bring a defendant in court.

4. CORPORATIONS. *Appearance. Suggestion to court of attorney for individual defendant.*

In a suit against a foreign corporation and also its president who was its principal stockholder and active manager and who, in his individual answer, set up all the defenses he thought could have been set up by the corporation, such president's attorney of record, by his suggestion or argument to the court that the corporation was not properly in court; did not thereby enter an appearance for the corporation, since he clearly had the right to suggest that any proposed motion in the case should be overruled, either as attorney of one defendant or as *amicus curiae*.

APPEAL from the chancery court of Clay county.

Hon. A. J. McIntyre, Chancellor.

Suit by John Brand against the Columbia Star Milling Company and others. From a decree *pro confesso* and final judgment against the named defendant, it appeals.

The facts are fully stated in the opinion of the court.

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Gates T. Ivy, for appellant.

There are two points of controversy arising out of this appeal, namely: First: Did the lower court have jurisdiction of the person of appellant by proper process? Second: Did appellant by any act of its own, or by duly authorized attorney, enter a voluntary appearance to the merits of the controversy?

Now adverting to the first topical question we submit: That appellant was never properly served with process in this cause and the court had no jurisdiction of its person and therefore no right to enter a decree *in personam,* or otherwise! and it may be here stated that the decree rendered was one *in personam.*

This court below found in its final decree, that appellant, had been properly made defendant under section 920 of the Mississippi Code 1906, to which reference is here made.

We urge that this was error in the light of the record in this cause. The provisions of the law referred to as applying to non-resident corporations as defined under the preceding section 919 requires that process shall be served upon any agent of the corporation found within the county where suit is brought. It is further provided under section 919, in defining the cases in which such non-resident corporations may be sued in this state, that any corporation having any transaction with persons or having any transactions concerning property situated in this state, through any agency whatever acting for it within this state, shall be held to be doing business here within the meaning of this section. Under section 920 it is provided that the officer serving process shall "state the facts, upon whom issued," etc., in his return; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, etc.

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We submit that this provision of law was not complied with. *Claughton* v. *Black, et al.*, 24 Miss. 185.

For a further authority urging the strictest compliance with the requirements of statutory laws relative to the service of process, see the case of *Bustamente* v. *Buscher, Shultz & Company*, 43 Miss. 172, especially the last few paragraphs in the conclusion of the opinion.

Inviting the court's attention now to the second topical question hereinbefore in this brief announced, we submit: that the court was wholly without warrant in finding that the appellant voluntarily appeared, notwithstanding the failure of process.

It is obvious that if the defendant, Schoening, and The Columbia Star Milling Company had been one and the same person, jurisdiction was acquired by the voluntary appearance of Schoening and for the purpose of the injunction by process on the trustee, or his appearance, but it is likewise obvious that if Schoening and appellant were different beings in law, then the appellant was improperly joined in this suit and a court of chancery should not have taken jurisdiction when the bill was amended, because on its face it appeared that the two defendants, Schoening and appellant, were different persons in law, because an individual and a corporation cannot be one entity, and because the bill sought an injunction against Schoening and a decree *in personam* against Columbia Star Milling Company.

All pleadings in the circuit courts of this state are required to be in writing. All pleadings must be filed by the party or his attorney, section 760. All actions must be commenced in the manner provided by section 728, the cause of action stated and filed in court, and therefore must be in writing.

Moreover all provisions pertaining to the declaration and commencement apply to pleas or appearances entered by the defendant, see section 739. It is the spirit of our law covering the subject of pleadings and practice that the complainant, or plaintiff, and the defend-

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ant, or respondent must appear before the courts of the land in a manner accompanied with such dignity or solemnity as that permanent proof or record of the fact may be made. It is therefore required that all pleadings shall be in writing; all motions must be in writing; all demands made upon the court relative to the quashing of writs, amending of pleas, leave to file pleadings and all matters touching the subject of pleading in court must be in writing.

This court so far back as 1860 in the case of *Byrne Vance & Co. v. Jeffries,* as reported in 38 Miss. 533, recites: "Appearance formerly was by actual presence in court, either in person or by attorney, and such appearance still exists in contemplation or fiction of law, but, in fact this appearance is now effected by making certain formal entries in the proper office of the court expressing his appearance."

The court had no right at the November term to enter a decree *pro confesso* against appellant, and counsel for Edward F. Schoening, who was himself financially interested in appellant institution, merely thought to show the court a possibility of error, and presented to the court the fact that Columbia Star Milling Company had not been served with process, and that a decree should not be entered against them, *pro confesso,* at the same time informing the court in open court that he had no employment from Columbia Star Milling Company; did not represent it; all of which is shown by the record in this cause above herein referred to.

It is not to be contemplated that parties who are without counsel, or over whom no jurisdiction had been acquired as provided by the laws of the country, are to be held and bound by any act of friendliness to the court and to the party on the part of an attorney employed and representing another party defendant in the cause, unless such attorney is acting with the knowledge or consent or under the authority of such party;

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certainly the courts of the land are not factories out of which may be turned agents and instrumentalities to be enforced upon others. Agencies may be created in only two ways: first, by expressed assent of delegation; second, by implication, or in other words, agencies by estoppel. Certainly counsel for Schoening was not an agent by expressed authorization; as surely he was not an agent by estoppel, because no act of appellant, no knowledge, no assent, no conduct whatever furnished facts upon which estoppel might be predicated.

It is recognized that the course which has been made necessary by the action of the court below in assuming jurisdiction without warrant will operate as an appearance to the cause on reversal, when the case will be remanded for trial; appellant having appeared in the appeal, has entered an appearance to the jurisdiction of the court, but this right should be, and will be, granted the appellant to defend against an action brought in this state against it, and to present to a court of law its defense to the complaint.

W. G. Roberds, for appellee.

It is stated that no copy of the publication was mailed to appellant, whereas a copy of the general docket made a part of the record by agreement, shows that publication was mailed by the clerk to appellant on May 29, 1915.

Cases cited by appellant. Appellant cited three cases: *Claughton* v. *Black, et al.,* 24 Miss. 198; *Vance & Co.* v. *Jeffries,* 38 Miss. 540; *Bustamente* v. *Bescher, et al.,* 43 Miss. 173.

The first case was in the circuit court and there was no claim of appearance. The second case is interesting and gives a brief history of the manner formerly of appearing and the manner at the time this decision was rendered, April term, 1860. The court said: "Appearance formerly was by actual presence in court, either in per-

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son or by attorney, and such appearance still exists in contemplation or fiction of law. But, in fact, this appearance is now effected by making certain formal entries in the proper office of the court, expressing his appearance. Bouvier's Law Dict., title Appearance.

"As the appearance anciently was an actual one, so the pleading was an oral altercation, in open court, in the presence of the judges. During this altercation a minute in writing was made by the proper officer, comprising a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the pleading; and this was called the record.

"The appearance of the parties is no longer by actual presence in court. It is effected on the part of the defendant by making certain formal entry in the proper office of the court, expressing his appearance. Stevens on Pleading, 22-26."

But the court in that case also said:

"If, in the case of *Hemphill* v. *Hemphill,* it was intended to say that appearance to the action could only be effected by plea, or in proper person without plea in open court, and making the necessary waiver and consent of judgment; and that it could not be done out of term time by entry on the complaint of appearance to the action (in the proper office, and before the clerk of the court) we are not willing to sanction the doctrine of that case to that extent."

We submit it has never been the rule and is not the rule now that a party cannot make appearance in a case except by signature to some pleading; if he appears in open court and contests the right to make an order or take a decree *pro confesso* makes an "extended and ingenious argument" against it, that is sufficient appearance, not to require him to go to trial then, but to require an answer by the next term, thereby giving him plenty of time to prepare his pleadings and his defense.

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Authorities. As stated in appellant's brief, there are only two questions involved in this appeal: First: Did the service of process give jurisdiction? Second: Did appellant appear? An affirmative answer to either, in effect, disposes of the other question. We submit there was proper service. Section 919, Code 1906; section 920, Code 1906; Laws 1908, page 132; *Vicksburg S. & P. R. Co.* v. *Forcheimer*, 74 So. 420, Advance Sheets, Southern Reporter, April 14, 1917, page 420 (Miss.)

Appearance was such as to require appellant to make answer: Sections 3946, 3947, Code 1906; *Fisher* v. *Pacific Mutual Life Ins. Co.*, 72 So. 847 (Miss.); *Railroad* v. *Swanson*, 92 Miss. 485; *Standard Oil Co. of Ky.* v. *Attorney-General*, 65 So. 468 (Miss.); *Vicksburg, S. & P. Ry.* v. *Forcheimer, supra; Young* v. *Rankin*, 4 Howard, 27; *Gardiner* v. *Gardiner*, 35 Colorado, 147, 83 Pac. 646.

SYKES, J., delivered the opinion of the court.

The appellee, John Brand, filed a bill in the chancery court of Clay county, Miss., making as defendants thereto Edward F. Schoening, Columbia Star Milling Company, and David Cottrell. The material allegations of the bill are that the complainant had executed and delivered to the defendant, Schoening, a trust deed conveying to Cottrell as trustee certain land in Clay county to secure the payment of a promissory note for $600, with interest; that the complainant had been in the employ of the defendant, Schoening to sell flour manufactured by the defendant milling company, but that Schoening was the real owner of the mill and was doing business under the name and style of the Columbia Star Milling Company, a few shares of stock being owned by his relatives; that he was employed under a yearly contract for a salary of $250 a month to sell flour; that for no just cause Schoening required

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him to resign his position before his time had expired, thereby causing him to be damaged in a certain sum. This sum he desires to have ascertained by the court and credited on the amount that he owes Schoening on the note secured by the deed of trust, and that the contemplated sale of the property embraced in the deed of trust be enjoined until the court ascertain the amount, if any, due Schoening or the mill after the above credit is given complainant. This bill was answered by the defendant, Schoening, alone. He denied all of the material allegations of the bill and alleged that the Columbia Star Milling Company was a foreign corporation doing business under the laws of the state of Illinois; that the note and deed of trust were the individual property of the defendant, Schoening. He also denied that any indebtedness was due complainant by the Columbia Star Milling Company. The bill was not answered by the Columbia Star Milling Company. Proof of publication for the defendant corporation was duly made. Some time after the proof of publication had been made the original bill was amended so that the charge was made in it that the Columbia Star Milling Company was a corporation of the state of Illinois. The original bill was filed on April 5, 1915. Personal service was attempted to be had on the nonresident corporation by the issuing of a summons directed to it on September 6, 1915, which summons commanded it to appear before the chancery court of Clay county at rules on the 13th day of September, 1915. This summons was served, as is shown by the return of the sheriff herein quoted:

"I have this day executed the within writ personally by delivering to J. F. Evans, a traveling salesman of the Columbia Star Milling Company, a true copy hereof. Witness my signature this September 6, 1915. Sid A. Deans, Sheriff."

A copy of this process was not mailed to the home office of the corporation by registered letter, as is re-

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quired by section 920 of the Code of 1906, until the 30th day of December, 1915. A term of the chancery court had been held between the service on J. F. Evans and the mailing of the registered notice. At the November term of the court the complainant filed a motion for a decree *pro confesso* against the Columbia Star Milling Company, which had filed no answer and made no appearance. The learned chancellor in overruling this motion filed a written opinion upon the same, which we here quote in full:

"This cause came on for hearing on motion of complainant for a decree *pro confesso* against the Columbia Star Milling Company, Edward F. Schoening having prior to that time filed answer to the bill, and his counsel, Gates T. Ivy, appeared and made an argument against the motion for a decree *pro confesso* as to the Columbia Star Milling Company, claiming that he was not appearing in any sense of the word for the Colcmbia Star Milling Company, yet made a very extensive and ingenious argument against the sustaining of said motion, it being claimed by the complainant that this appearance is the appearance of the Columbia Star Milling Company.

"In the hearing of a motion of this kind, it is necessary for the court to understand the nature of the original bill upon which process was based, and to ascertain whether or not proper service has been made. It is the contention of Mr. Ivy that proper process upon the Columbia Star Milling Company has not been made. It is conceded by the counsel for complainant in this cause that possibly the service of the process is deficient, inasmuch as a copy of the process was served upon Mr. J. F. Evans, traveling salesman or traveling agent of the Columbia Star Milling Company, and was not sent to the company by registered letter by the clerk who issued the process. Under our law, as I understand it, any appearance of any nature by a defendant is an appearance final.

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"Now, the question arises as to whether or not the appearance of the attorney, who represented the president of the Columbia Star Milling Company, the defendant herein, and who, by his answer, owns seven hundred and thirty shares of the capital stock of the Columbia Star Milling Company, and who is charged in the bill as owning virtually the entire stock of the Columbia Star Milling Company, as to whether or not his appearance is the appearance of the Columbia Star Milling Company, without having filed any papers in the case. I am of the opinion that this appearance constitutes sufficient appearance of the Columbia Star Milling Company to put them into court.

"Let the motion, therefore, for a decree *pro confesso*, be overruled and the Columbia Star Milling Company be given until next term of this court to file its answer and the application of complainant to amend his bill by adding the following therein, after the words, 'Columbia Star Milling Company,' first appearing in the bill, to wit, 'a corporation under the laws of the state of Illinois, with its domicile at Columbia, in said state,' is granted and complainant may amend his bill at any time before the filing of the answer of the Columbia Star Milling Company, and within thirty days from this date should the answer be immediately filed."

The Columbia Star Milling Company, after the above decree was entered, never answered the bill nor attempted to make any defense to the suit. On final hearing decrees *pro confesso* and final were entered against the Columbia Star Milling Company for the amount complainant claimed due him under his contract for services. The chancellor in this decree in part says:

"And it appearing to the satisfaction of the court that service of process was had upon said defendant, the Columbia Star Milling Company, according to section 920, Code 1906, and that this court by decree filed November 12, 1915, found that said defendant, the

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Columbia Star Milling Company, had made appearance in this court by attorney in resisting a motion for decree *pro confesso*, at said term, and the said defendant given until the present term to answer. And it appearing that said the Columbia Star Milling Company has failed to answer or to file any plea in this cause."

He also found in favor of the defendant, Schoening, on the other issues in the case. From this decree the defendant the Columbia Star Milling Company prosecutes this appeal.

There are but two questions involved in this appeal: First, was any personal service had upon the Columbia Star Milling Company, an Illinois corporation? Second, did the attorney of record of Mr. Schoening enter an appearance for this corporation by his argument against sustaining the first motion for a decree *pro confesso*?

Of course, no personal judgment could be entered against this defendant on publication of process. The only question then to be considered on this proposition is whether or not the attempted service on J. F. Evans, as agent of this corporation, on September 6, 1915, and the mailing of a copy on December 30, 1915, was a compliance with section 920 of the Code. This section says that "it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter." It is also to be remembered that this summons called for the appearance of the corporation in court at rules on September 13, 1915. In other words, several months had expire before the copy was mailed to the home office of this defendant, and the return day had also passed. The summons was *functus officio*, its return day having passed. The statute was not complied with, in that the copy was not immediately mailed. This is a necessary part of the service of summons in order to bring a defendant in court.

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The next question is: Did Mr. Ivy, the attorney of record of the defendant, Schoening, by his suggestion or argument to the court that the Columbia Star Milling Company was not properly in court thereby enter an appearance for the Columbia Star Milling Company? Mr. Ivy was an attorney of record in the case representing the defendant, Schoening, in his individual capacity. The defendant, Schoening, and the Columbia Star Milling Company are two separate parties, one being an individual and the other a corporation. Each must be properly brought into court before he be required to answer its orders. As an attorney in the case, we think it was clearly the right of Mr. Ivy to suggest to the court that any proposed motion in the case should be overruled. He had this right as an attorney of one of the defendants. He also had the right to make this suggestion as *amicus curiae*. The opinion of the chancellor expressly states that Mr. Ivy disclaimed representing the defendant, Columbia Star Milling Company. The learned chancellor was persuaded that this was an entry of appearance of the Columbia Star Miling Company because Schoening was the president of this corporation and was its principal stockholder and its active manager, and in his individual answer to the bill he set up all of the defenses that he thought could have been set up by the corporation. This all may be true; however, this answer of Schoening was his separate answer, and was treated as such by the court, and was not considered as the joint answer of Schoening and the corporation. As a defendant in the case he had a perfect right to answer fully all of the allegations of the bill. The final decree of the court in this case did not treat this answer as one of the defendant corporation, but entered a decree *pro confesso* against it.

We therefore conclude that the attempted service under section 920 of the Code of 1906 was void, and that there was no voluntary appearance of the appel-

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lant corporation in this case. The decree of the lower court is reversed, and the cause remanded, with leave to the appellant, Columbia Star Milling Company to plead, answer, or demur to the bill within sixty days after the mandate of this court is filed in the court below.

Reversed and remanded.

WILKERSON v. HARRINGTON ET AL.

[76 South. 563, Division B.]

1. TAXATION. *Tax sales. Statute.*

Lands in different sections owned by the same party and only separated by a public road, should be assessed for taxes as a single tract.

2. SAME.

Lands in different sections, though owned by the same party but located a material distance apart, and in no way connected nor used as a part of a single farm or plantation, should not be assessed for taxes as a single tract.

3. TAXATION. *Tax sales. Contiguous tracts.*

Under Code 1906, section 4328, providing for the sale of lands for delinquent taxes, lands lying in different sections, which corner on the section line and which are owned by the same party, should be assessed and sold as one tract; the fact of their cornering being sufficient to show that they were contiguous, the word "contiguous tract" meaning tracts in actual or close contact to, adjacent, or near.

APPEAL from the chancery court of Chickasaw county. HON A. J. MCINTYRE, Chancellor.

Bill by S. A. Wilkerson against C. C. Harrington and others. From a decree, Wilkerson appeals and Harrington cross-appeals.

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Appellant, Wilkerson, exhibited a bill in chancery against appellees to cancel certain tax deeds executed by the sheriff of Chickasaw county to appellees and embracing four hundred and eighty acres of unimproved lands. The lands involved are described as the east half of the southeast quarter of section 22, the southwest quarter of section 26, the northeast quarter of section 27, and the northwest quarter of section 34, all in township 13, range 2 east. A plat or diagram of these lands will show that the lands in sections 22 and 27 join on the section line the full length of one forty, that the lands in sections 27 and 26 corner, and that the lands in section 34 are removed from the other lands the full distance of a quarter section. It is alleged in the bill of complaint that the sale was not conducted in accordance with the statute, and was unlawful, in that the lands were not sold as one tract, and that the statute requiring lands constituting a separate tract and belonging to one owner to be offered in forty-acre subdivisions was not complied with. It is also contended that one, W. A. Harrington, personally appeared and bid off a part of the lands, and had the deeds taken in the name of the defendant, C. C. Harrington, and that this was unlawful, and rendered the deeds void. This latter contention is not insisted upon in the oral arguments and briefs of counsel, and need not be further noticed.

The answer denied that the lands were sold in an improper and unlawful manner, averred that each quarter section was sold by first offering the northeast quarter of the said quarter section, and that, upon a failure to get a bid thereon sufficient to realize the taxes due, then the adjoining forty was added, and so on until the entire quarter section was offered and sold. It is thus conceded in the answer that the whole tract of four hundred and eighty acres was not sold together as one tract, and the answer denies that the four hundred and eighty acres in fact constitutes one

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separate tract within the meaning of the statute. Each quarter section was sold by the sheriff as a separate tract, while the eighty acres in the east half of the southeast quarter of section 22 was likewise sold as a separate tract. There is evidence that a public road ran between the eighty acres in section 22 and the lands in section 27. The court upon hearing granted relief as to the three hundred and twenty acres in sections 26 and 27, but denied relief as to the one hundred and sixty acres in section 34. There is evidence that the complainant did not live in the county of Chickasaw, and did not know of the sale until after the expiration of two years; that the lands were unimproved or "wild" lands; that after the complainant learned of the sale he offered to do equity, by paying all taxes, interest, penalties, and notary and recording fees, but the defendant refused to accept complainant's offer. It is conceded that the taxes were not paid on any of the lands, and the only question is as to the legality of the method or manner of sale.

The complainant, Wilkerson, being dissatisfied with the decree denying relief as to the one hundred and sixty acres in section 34, prosecutes an appeal to this court; while the appellee, Harrington, prosecutes a cross-appeal, contending that the sheriff was justified in selling the lands in each quarter section separately. The record shows that the two forties in section 22 were struck off to and deeded to W. A. Harrington, while the other lands were conveyed to appellee, C. C. Harrington.

S. A. Wilkinson and *A. T. Stavall,* for appellant.

We insist that this was "one tract" assessed to the "same owner," and that under section 4328 of the Code of 1906 the sheriff should have first offered forty acres for sale and if this tract did not sell for enough to pay the whole amount of taxes, then he should have

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added another forty acres, and then offered eighty acres, and if this did not sell for enough to pay the whole taxes, he should have added another forty acres and so on until he had procured enough to pay the whole taxes, or until he had sold the entire tract.

In *Griffin* v. *Ellis,* 63 Miss. 348, a suit was filed in this same county to have cancelled a tax deed. In that case the court said: "Notwithstanding that there has been, since the adoption of the Code of 1871, a statute declaring that no defense shall avail against a title, acquired in a sale for taxes, unless it be shown that the taxes for which the sale was made had been paid before the sale, the decisions of this court have been uniform in construing this declaration in connection with other provisions of law, as not preventing the owner from showing in defense a total departure from the provisions of law governing and directing the assessment and sale of the land for taxes." See 58 Miss. 138; 57 Miss. 65; 53 Miss. 519, and 54 Miss. 58.

In the case of *Nelson* v. *Abernathy,* 74 Miss. 164, going up from the same county, the supreme court said: "As to the land, it is distinctly averred in the bill and admitted by the demurrer that the sheriff offered first one forty-acre tract and then another disconnected from it and so on, and then the whole of that tract and did not add the second forty-acre tract to the first and the third to the first two and so on, and that in offering each forty-acre tract, he failed entirely to designate or describe each such lot in any way whatever."

Continuing the court said: "We do not now hold, however, that the failure to do this would make the sale void, but we do hold that the failure to describe, or designate in any way what forty acres the sheriff was offering does render the sale void. One who bids at a tax sale is entitled to know for what, precisely, he is bidding and the owner is entitled to have his land so offered by proper designation that intending purchasers may be able to bid intelligently and that the

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part thus properly sold may bring as much as possible."

In this same case the court quotes from the Code of 1880, the language found in the Code of 1906 and referred to above and then say: "But this court in *Griffin* v. *Ellis*, 63 Miss. 348, in construing this very statute, held sale void, because the collector sold the whole body of land without first having offered it in sub-divisions, adding to each body an additional subdivision, until the whole was exposed."

"And it is clear that the provision in section 3813, Code of 1892, providing that no error in conducting the sale should invalidate it, does not have the effect to cure a total departure from the manner of selling prescribed by law."

In the case of *Gregory* v. *Brogan*, 74 Miss. 694, a suit was filed, asking for the confirmation of a tax title. There were several tracts and the different tracts were assessed separately as in this case. The proof showed that these parcels were contiguous and the court held that they constituted "one tract." *Rufus E. Provine et al.* v. *James Thornton et al.*, 92 Miss. 395. Parcel—"A piece of land of indeterminated extent, but usually a large lot of ground. Within the meaning of a tax law, held to apply to a whole section of land." (Anderson's Dictionary of Law.)

It is elementary that courts in construing a statute should endeavor to ascertain the intention of the legislative branch of the government in passing a law. What did the legislature mean when in section 4328 of the Code, it used the words "one tract" and assessed as the property of the "same owner"? The purpose of the law was to prevent the tax collector from doing just what was done in this case. As suggested in the case of *Gregory* v. *Brogan, supra*, the mode of sale adopted by the tax collector, "made it inevitable that the whole tract would be sold for taxes upon it, no matter how much any one forty acres might have brought." The tax collector testified that he began

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with the lowest number of sections referred to in the bill, that is with the land in section 22. That was decidedly the least desirable land in the whole tract, and the proof shows that that tract sold for twenty dollars, whereas the most valuable quarter section in the tract, one hundred and sixty acres in section 34, sold for only seventeen dollars and forty-five cents.

The five hundred and sixty acres owned by the complainant being far out in the wilds of Chickasaw county, was in fact known as one tract, and was assessed to the same owner, and no sound reason can be offered as to why the legislature did not mean to protect this owner in the same manner as if this land had constituted a square.

We respectfully submit that the trial court erred in refusing to grant the relief prayed for as to the northwest fourth of section 34, and that the decree of the trial court so far as said quarter section should be reversed, and a decree rendered here in favor of the complainant.

I. E. Harrington, for appellee.

The only contention advanced by the appellant that is worthy of consideration is the proposition that the land was not sold as one tract. If all this land constituted one tract and the same was not offered in forty-acre tracts, described and specified, adding each time the same was offered, a definitely described forty acres, of course the same under our statute and decisions, was void. The only thing to be decided by the court in this case is whether the four hundred and eighty acres was one tract and if not then on the cross-appeal whether the northeast quarter of section 27 and the southwest quarter of section 26 and the east half of the southeast quarter of section 22, constituted one tract. It will also be necessary to decide whether the southwest quarter of section 26, is a part of the northeast quarter of section 27, if the court should decide that by

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reason of the fact that the said eighty acres joins the northeast quarter of section 27 on the north that said eighty and one hundred and sixty acres were one tract.

It is contended by appellant that the land was not sold by offering a definitely described forty acres and upon failure to get proper bid by adding another forty acres until the whole four hundred and eighty acres was sold or until the taxes on the whole four hundred and eighty acres was bid and made at such sale. It is admitted by the answer and cross-bill that the four hundred and eighty acres was not sold as one tract, but that each quarter section was sold as a separate tract, and the eighty acres was sold as a separate tract. The testimony of H. L. Harrington was incompetent and should not have been admitted over the objection of appellee. The sheriff could not impeach his own sale. *Mixon* v. *Clevenger*, 74 Miss. 67, 20 So. 184.

The trial court decided on the authority of *Gregory* v. *Brogan*, 74 Miss. 694, 21 So. 521, that as the lands were contiguous that the northeast quarter of section 27, and the southwest quarter section 26, and the east half of southeast quarter of section 22, all in township 13, range 2, east, should have been sold as one tract, and that the sale of said subdivisions was void for that reason, but that the northwest quarter of section 34, township 13, range 2, east, was not contiguous to the other lands, but a separate tract, and that the sale of the same was valid.

There is a labored effort on the part of counsel for the appellant to show that the northwest half of section 34, township 13, range 2, and the other lands constituted one tract, but there is no doubt but what the trial court reached the proper conclusion as to this quarter section. It did not join the other lands; it was never used or occupied by the same tenant, being wild lands, and was assessed as a separate tract, and sold as such, and there can be no doubt but the sale was valid. If this land had been sold with the other lands, the sale would have been void. *Higdon* v. *Salter*, 76 Miss. 766, 25 So. 864; *Speed* v. *Mc-*

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Night, 76 Miss. 723, 25 So. 872; *Hewes* v. *Seal,* 80 Miss. 537, 32 So. 55.

As to the other lands the only thing that can be said in favor of the appellant is that the lands are contiguous. They were not used as a farm, as was the case in *Gregory* v. *Brogan,* 74 Miss. 694, 21 So. 521. They were wild lands.

A tract, of land is a body of land or plantation. 28 Am. Eng. Ency. of Law, page 338, note 1. There it is said: "The term plantation as well as tract is used as descriptive of a body of land. In common parlance they are used as convertible terms, and we speak of our plantation or our tract of land, intending to be understood as speaking of the same body of land. A plantation may consist of several tracts of land; indeed it is most commonly the case that it does." In 38 Cyc. 669; a tract is defined as something drawn out or extended; a region or quantity of land or water of indefinite extent.

The fact that the lands involved in this suit are wild lands, that they were not used as a farm, that the east half of section 22 is separated from the northeast quarter of section 27 by a public road, and the fact that the northeast quarter of section 27 and the southwest quarter of section 26 only cornered and only touched at an infinitesimal point distinguishes this case from the Brogan case, and shows that they were in truth and in fact separate and distinct tracts of land and could not have been sold as one tract. *Higdon* v. *Slater,* 76 Miss. 732, 25 So. 872; *Hewes* v. *Seal,* 80 Miss. 537, 32 So. 55.

We submit that there was no error on the part of the trial court in deciding that the northwest quarter of section 34 constituted a separate tract from the other lands, but we do earnestly insist that the lower court erred in holding the east half of southeast quarter of section 22, and the northeast quarter of section 27, and the southwest half of section 26 to be one tract, and submit that these separate subdivisions constituted separate and distinct tracts under the proof, and that therefore the sale was valid, and that the title of the appellee and cross-appellant

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to all of said lands should have been confirmed by the lower court, and ask that a decree be entered here to that effect. We especially insist that the sale was valid as to the southwest quarter of section 26, because it could not be considered as one tract with the northeast quarter of section 27, and also as to northwest quarter of section 34, which at no place touches the other lands.

STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). The proof shows without conflict that the lands in sections 22 and 27 join on the sides and are admittedly contiguous. It is further shown that all the lands involved in this suit, as well as the two forties in section 22 belong to and were assessed to the one owner, appellant Wilkerson. There is no merit in the point that a public road would be sufficient to separate the lands in section 22 and the lands in section 27, so as to make them two separate tracts. There is no question, then, about the lands in sections 22 and 27 forming a part of the same tract. We think, also, there can be no question about the *status* of the lands in section 34. The quarter section in 34 is located a material distance away from the other lands in controversy and constitutes in itself a separate tract within the meaning of the statute. None of the lands were in cultivation, and accordingly the lands were not connected in the sense of comprising one farm or plantation. The lands in section 34 were separately assessed on the assessment roll, and, being removed from the other lands, were properly sold as a separate tract. The complainant failed to show that the sheriff did not comply with the statute by first offering forty acres, and then adding a similar subdivision, and so on until the requisite amount of taxes was produced. It appears that the lands brought small amounts, the one hundred and sixty acres in section 34 realizing seventeen dollars and thirty-five cents, and at no time did the sheriff have sufficient excess to relieve the balance of the lands from a sale.

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The only difficulty in the case is in the answer to the question whether the lands in sections 26 and 27, which corner on the section line, are to be regarded as forming, in connection with the two forties in section 22, one tract. Our first duty is to construe section 4328, Code of 1906, and especially the language "until all the land constituting one tract and assessed as the property of the same owner be offered." Confessedly we have here "the property of the same owner" which is being sold. The primary purpose of the statute is to collect the delinquent taxes and to do so with the least possible injury to the taxpayer. As remarked by our court in *Gregory* v. *Brogan,* 74 Miss. 694, 21 So. 521:

"It is not the policy of the government to punish the delinquent taxpayer. On the contrary, it is the policy to collect the tax with the least possible injury to the delinquent taxpayer, and consequently the collector shall sell the smallest amount of land that will bring the delinquent taxes."

The object of the statute is to realize "the amount of taxes due by" the one taxpayer whose property is being proceeded against. In making the sale, therefore, the collector should offer all the land constituting one tract, or so much thereof as is necessary in realizing the debt due by the owner. With these principles in view, we are justified in holding that the lands in sections 26 and 27, under the facts shown by this record constitute one tract. Our court in *Provine* v. *Thornton,* 92 Miss. 395, 46 So. 950, had occasion to say what constituted "a single tract," within the meaning of section 111 of the Constitution, and in reaching our conclusion in the present case we are within the spirit of the Province-Thornton decision. What constitutes one tract depends largely upon the particular statute or context in which the phrase is employed. We find in Words and Phrases, vol. 2, p. 1496, the following statement:

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"'Contiguous,' as defined in Webster's Unabridged dictionary, means 'in actual or close contact to; touching; adjacent; near; lying and adjoining.' A tract of land is 'contiguous' to another tract which corners with it. *Clements* v. *Crawford County Bank,* 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149."

It is true the Arkansas court, in the case referred to, was called upon to determine what constituted a homestead within the meaning of their statute. Our court in the Province-Thornton Case recognized:

"That the usual signification of the word 'tract,' as applied to land, is contiguity of the parcels of property."

We think, within the meaning of our revenue statute here under review, the lands are sufficiently contiguous if they touch or corner. This appears to have been the view of the learned chancellor, and it follows that the decree complained of must be affirmed, on both direct and cross appeal.

Affirmed.

MERCHANTS & MANUFACTURERS BANK OF ELLISVILLE *v.* PHILLIP J. TOOMER LUMBER COMPANY.

[76 South. 565, Division A.]

1. SALE. *Passing of title.*

Where there was an unconditional sale of a carload of lumber, the title passed to the buyer, when the lumber was delivered to the railroad for transportation to the consignee buyer.

2. SALE. *Unconditional delivery to consignee. Bill of lading.*

Where a carload of lumber was delivered to a railroad for shipment to the buyer thereof, and the bill of lading for the same named the buyer as consignee, in such case the bill of lading was *prima-facie* evidence of an unconditional delivery to the consignee.

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3. SALE. *Passing of title. Delivery to carrier. Intention.*
Where goods are delivered by a vendor to a common carrier consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction.

4. CARRIERS. *Transfer of bill of lading. Title.*
An assignment or transfer of the invoice or bill of sale of a carload of lumber by the consignor to a bank, together with the delivery of the bill of lading, vested in the bank whatever title the consignor had to such lumber, this assignment and delivery constituted a symbolical delivery of the carload of lumber.

5. SALE. *Retention of bill of lading and delivery to bank. Effect.*
The retention of a bill of lading covering a carload of lumber by the consignor and the delivery of it, together with an assignment of the invoice of the lumber to a bank, in the absence of any testimony as to an absolute sale of the property to the consignee, shows that the consignor did not intend to part with its title or right of *jus disponendi* over the carload of lumber by the consignment to the consignee of the lumber.

6. SAME.
Where the bank upon becoming the purchaser of the carload of lumber, as above stated, inclosed the bill of lading, together with the invoices, to the consignee, expressly stating in its letter to the consignee that the invoice and bill of lading were the property of the bank, and must be returned at once or remitted to them direct, and at the terms at which the lumber was purchased, this notation by the bank was a notification to the consignee of its ownership of the property covered by the bill of lading and invoice, and the bank retained title to the carload of lumber until its terms were accepted and where there was no acceptance of the shipment by the consignee before the seizure of the lumber under an attachment, the banks claimant's issue as against the attaching creditor of the consignee should be sustained.

7. CARRIERS. *Stoppage in transitu.*
In such case the doctrine of stoppage *in transitu* does not apply where the legal title to the lumber sold was in the bank.

APPEAL from the circuit court of Chickasaw county.
HON. J. L. BATES, Judge.

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Suit by the Phillip J. Toomer Lumber Company against the Ganahl Lumber Company, wherein the Merchants & Manufacturing Bank of Ellisville filed a claimant's issue. From a judgment against the bank, it appeals.

The facts are fully stated in the opinion of the court.

Watkins & Watkins, for appellant.

This case turns upon one single proposition of law. There is but one question involved in the whole dispute, and we will therefore confine this argument to that one subject. Briefly stated, it is this: Does the transfer of a bill of lading, by the consignor or his vendee, to a third party, for value, operate to transfer the title to the goods covered by such an instrument? If this query can be answered in the affirmative, the court will encounter little difficulty in reaching a decision.

1. The transfer of a bill of lading, covering goods in transit, operates as a transfer of the title to the goods as effectually as if the goods themselves are delivered.

This proposition of law is so fundamental, so well-established by an interminable line of decisions in both state and federal courts, that it will only be necessary to state the law as laid down in the text-books and encyclopedias.

In 4 American & English Encyclopedia of Law, we find the following at page 546: "General rule. As symbols of the property therein receipted for, bills of lading are, at common law, transferable so as to pass the title to the goods *in transitu,* when such is the intention, as effectually as if the goods themselves were delivered." *Allen* v. *Williams,* 12 Pick. (Mass.), 297; 6 Cyc., at page 426.

In connection with this statement of the general law, we wish to cite a decision of this court which follows

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exactly the proposition laid down in Cyc. "The supreme court, in support of the text, in the case of *Shaw* v. *Bank*, 101 U. S. 557, 25 Law. Ed. 892, says: 'The function of that instrument (bill of lading) is entirely different from that of a bill or a note. It is not a representative of money used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract true; it is a symbol of the ownership of goods covered by it, representative of those goods. Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it.'' *Searles Bros.* v. *Grain Co.*, 80 Miss. 688; *Haas & Company* v. *Citizen's Bank*, 39 So. 129.

Under the laws as here shown, appellant was the actual owner of the carload of lumber because of the title and right of possession it acquired as transferee of the bill of lading, for which it paid a fair and reasonable consideration.

Appellee may contend that upon the delivery of this lumber to the carrier by the original consignor, title became vested in the consignee, Ganahl Lumber Company. But this is not true. Where the transferee of a bill of lading has paid a fair consideration to the consignor or transferror, he becomes vested with a special property in the goods covered by the bill of lading which is defeasible only by the act of the consignee in paying for the goods delivered. *American National Bank* v. *Henderson*, 123 Ala. 612; *Cosmos Cotton Co.* v. *First Nat. Bank*, 171 Ala. 392; *Hood* v. *Bank*, 67 So. 721.

How can the defendant be said to have been the owner of this carload of lumber at the time it was seized under attachment, when it had absolutely no control or possession of same, had not received or even

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accepted the contract, and could not get the lumber until the original bill of lading was forwarded to it.

We therefore respectfully submit that this case should be reversed and judgment entered here for the appellant for the reason set out above and under the law governing this case.

Joe H. Ford, for appellee.

The issues presented by this record and the arguments in the court below and brief of counsel here, are: 1. Did appellant have the right of stoppage *in transitu* at the time the lumber was attached? 2. Did appellant have the right to sue in its own name conceding that at the time it brought the claimant's issue it had the equitable right to the lumber? 3. Was title to the lumber in appellant at the time it brought the claimant's issue in the attachment suit?

If either of the foregoing questions is to be answered in the negative, the case must be affirmed. I shall undertake to discuss these questions in their order and at the same time answer the argument of counsel for appellant in their briet.

1. In the lower courts, appellant rested its case on their right to exercise the doctrine of stoppage *in transitu* and did not contend that at the time the lumber was attached, it had title thereto at all. Did appellant have the right of stoppage *in transitu* at the time the lumber was seized or at the time it brought this claimant's issue? "That right exists in the single case of insolvency." *St. Joze Indiano,* 1 Wheat. (U. S.) 208; 4 L. Ed. 73; 35 Cyc. 494; *Towley* v. *Bigelow,* 12 Pick. 307; 23 Am. Dec. 607; Benjamin on Sales (7 Ed. Bennett's), pp. 907, 908, Am. Note; 35 Cyc. 494, Note 82. *St. Joze Indiano,* 1 Wheat. (U. S.) 208; 5 L. Ed. 73.

2. The bill of lading was marked on its face in large letters: "Not negotiable." It was not indorsed when it came to W. M. Carter Lumber Company nor was it ever indorsed by that company, the consignor, or

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consignee. I know that, as a general rule, the ordinary bill of lading does not have to be indorsed in order to transfer the property it represents, where it is attached to a draft on the consignee for the purchase money which is duly indorsed. But I have been unable to find any case where this was held to be the rule where the bill of lading itself was marked and issued "non-negotiable." Such a stipulation and limitation is certainly a part of the contract of carriage and could not well be disregarded.

3. In the first place, then, did appellant ever have the legal title to the property as the holder of the bill of lading? In the second place, if it ever had title, had it parted with such title before it brought this claimant's issue.

"By taking the bill of lading, the name of the consignee, the shipper vests apparent title in him." 6 Cyc. 426. "In *Grove* v. *Brien et al.*, 8 How. 439, this court said: 'The effect of a consignment of goods generally is to vest the property in the consignee' and though it is also there declared that this effect may be controlled by special clauses in the bill of lading, or by evidence *aliunde*, yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded." *Lawrence* v. *Minturn*, 17 How. (U. S.) 451, 15 L. Ed. 58. To the same effect are *Griffin* v. *Ingledew*, 6 S. & R. (Penn.) 429, 9 Am. Dec. 444; *Wayland* v. *Moseley*, 5 Ala. 430, 39 Am. Dec. 335; 4 A. & E. Ency. of Law, p. 525 (e); 6 Cyc. 433-H; 4 R. C. L. p. 15, par. 18.

3. But waiving all other considerations and conceding, for the sake of argement, all that is said in the brief of counsel for appellant, the end to all argument was made when appellant, on the day before the lumber was seized under the writ of attachment, mailed the bill of lading itself to Ganahl Lumber Company, the consignee named therein. That act of appellant "was the kick of the ass to the dying lion." If it ever had

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title, it parted with it then. It then made no difference whether the shipment was made in accordance with a previous contract of purchase or not. If, as counsel contend, it ever had the right after the lumber went forward under this bill of lading, to "change its destination" in transit it lost it by that act. Along with this bill of lading and invoice, was sent, by appellant, a notification slip in which was given to consignee the right to remit for the lumber just whenever it was convenient, but, if, within ten days at a discount of two per cent. or, if, within thirty days at a discount of one per cent. Benjamin on Sales (7 Ed. Bennett's), sec. 398b, page 369; 6 Cyc., p. 426.

This case appears to be the ordinary one where the dodging creditor undertakes, in a round about way, to escape the payment of its debts by combining and confederating with other parties to so complicate matters that its property may be sent out of the state immunized from the payment of its debts.

In my judgment, there is no escape from an affirmance, and I respectfully ask that the judgment of the lower court be affirmed with damages and costs.

SYKES, J., delivered the opinion of the court.

The W. M. Carter Lumber Company, of Laurel, Miss., received an order for some lumber from the Ganahl Lumber Company, of St. Louis, Mo., and had their agent, the Louin Lumber Company, of Louin, Miss., consign to the Ganahl Lumber Company a carload of lumber. The order for this lumber placed with W. M. Carter Lumber Company by the Ganahl Lumber Company, is not set out in the record, and we do not know what terms or conditions it contained. The Ganahl Lumber Company was named as the consignee in the bill of lading. The Louin Lumber Company, on the day of shipment, May 22, 1914, mailed to W. M. Carter Lumber Company this bill of lading and an invoice, or

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bill of sale, of the lumber contained in the car. On May 23d the W. M. Carter Lumber Company made out its invoice of the lumber or bill of sale, addressed to the Ganahl Lumber Company, in which invoice it is stated that the terms are:

"Cash, less two per cent. off in ten days. No discount on bills less than car lots."

This invoice or bill of sale is indorsed as follows:

"Pay to the order of Merchants' & Manufacturers' Bank of Ellisville, Miss.

"(Signed) W. M. CARTER LUMBER CO."

All of these invoices and the bill of lading were at that time delivered to the appellant bank. On May 25th the Merchants' & Manufacturers' Bank, in a letter written the consignee, inclosed the bill of lading and invoice of this lumber, making the following notation on said letter:

"This invoice and bill of lading is the property of the M. & M. Bank, and must be returned at once or remitted to them direct and at terms at which lumber was purchased.

"Note.—Terms, two per cent. discount will be allowed only on amounts paid us within ten days from this date; one per cent. on amount within thirty days."

A corrected invoice of the lumber was also inclosed in this letter. On the 26th day of May, or the day after the bank mailed the bill of lading and invoices to the consignee, this car of lumber, while in transit from Louin, Miss., to St. Louis, was seized under an attachment at Houston, Miss. by the appellee Philip J. Toomer Lumber Company, a creditor of the consignee, Ganahl Lumber Company. The bank filed a claimant's issue. Judgment by default was taken against the Ganahl Lumber Company, and the claimant's issue was decided adversely to the appellant bank in the justice of the peace court. An appeal from that judgment was prosecuted to the circuit court, where the case was tried by

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the judge, acting as both judge and jury, when again a judgment was rendered against claimant, the appellant bank, from which judgment this appeal is prosecuted.

The sole question presented to us for decision is whether or not the title to this carload of lumber was in the appellant bank at the time the attachment was sued out and its claim made. The controversy here is between a creditor of the consignee and the bank. No rights of innocent *bona-fide* purchasers for value are involved. It is well settled that, if there was an unconditional sale of the property by the W. M. Carter Lumber Company to the Ganahl Lumber Company, the title passed to the Ganahl Lumber Company in this case upon the delivery of the car for transportation to the consignee at Louin, Miss. It seems to be the law that the bill of lading in this case is *prima facie* evidence of an unconditional delivery to the consignee.

The intention of the consignor as to whether or not he meant the title to pass to the consignee upon delivery to the carrier is the real question in controversy. "Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction." *Emery Sons* v. *Bank,* 25 Ohio St. 360, 18 Am. Rep. 299. See, also, for a discussion of this question, Mechem on Sales, vol. 1, secs. 788, 789 and 790.

The assignment or transfer of the invoice or bill of sale by the W. M. Carter Lumber Company to the appellant bank, together with the delivery of the bill of lading, vested in the bank whatever title the Carter Lumber Company had to said lumber. *Bank* v. *Jones,* 4 N. Y. 497, 55 Am. Dec. 290; *Emery Sons* v. *Bank,* 25 Ohio St. 360, 18 Am. Rep. 299; *American National Bank* v. *Henderson,* 123 Ala. 612, 26 So. 498, 82 Am. St. Rep. 147; *Bonner* v. *Marsh,* 10 Smedes & M. 376, 48 Am. Dec. 754. This assignment and delivery constituted a symbolical delivery of the carload of lumber. The reten-

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tion of the bill of lading by the W. M. Carter Lumber Company and the delivery of it, together with an assignment of the invoice of the lumber, to the bank, in the absence of any testimony as to an absolute sale of the property to the consignee, shows that the W. M. Carter Lumber Company did not intend to part with its title or its right of *jus disponendi* over this carload of lumber by the consignment to the Ganahl Lumber Company.

The bank, upon becoming the purchaser of the same, as above stated, inclosed the bill of lading, together with the invoices, to the consignee, expressly stating in its letter to the consignee that the invoices and bill of lading were the property of the bank, and must be returned at once or remitted to them direct, and at the terms at which the lumber was purchased. The testimony, uncontradicted, for appellant, was that this notation by the bank was a notification to the customer of their ownership of the property covered by the bill of lading and invoice. We construe this to mean that the bank retained title to the carload of lumber until its terms were accepted. There was no acceptance of the shipment by the consignee before the seizure under the attachment. Before the title to the lumber could have passed to the consignee in this case, an acceptance of the terms as shown in the letter and invoices of the bank was necessary. The authorities above cited are in point upon this proposition. The entire record shows that the consignor never intended to part with the *jus disponendi* of this car, or the title to the same, by the mere consignment to the consignee. Since the bank was the owner of the car of lumber, and had the legal title thereto, its claimant's issue should have been sustained.

The doctrine of stoppage *in transitu,* as invoked by appellee, is not applicable, because the legal title to the lumber was in the appellant. Judgment should have been entered in favor of the appellant bank.

Reversed, and judgment here for appellant.

Reversed.

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WALKER BROS. & CO., LIMITED, v. DAGGETT.

[76 South. 569, Division B.]

1. FRAUDS, STATUTE OF. *Oral contract. Validity.*
Under Code 1906, section 4779, so providing, a verbal contract for the sale of goods is binding on the purchaser where he accepts and pays for a part of the same and he cannot cancel the order as to the balance of the goods though the contract is not in writing.

2. FRAUDS, STATUTE OF. *Delivery to carrier.*
The delivery of goods to a common carrier consigned to the purchaser is a delivery to the purchaser of such goods.

3. SALE. *Breach. Remedies.*
Where a part of a bill of goods verbally ordered was accepted and paid for by the purchaser, but before the balance of the goods were shipped, the purchaser notified the seller that he would not accept or pay for the balance of the goods, in such case the seller had the right to ship the goods and recover for the same and was not bound to sell the goods and sue for the difference between the price realized at such sale and the contract price.

ON MOTION TO REMAND.

4. SAME.
In such case where, after judgment in the court below and pend- an appeal to the supreme court, the seller had the goods involved in the suit and tendered to the buyer, removed from the warehouse of the common carrier, and returned to them and converted said goods to their sole use and benefit without the knowledge or consent of the buyer, the supreme court on motion will set aside its order entering judgment in that court and reverse and remand the cause.

APPEAL from the circuit court of Jackson county.

HON. J. H. NEVILLE, Judge.

Suit by the Walker Bros. & Co., Limited, against Wm. A. Daggett. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

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H. W. Guatier, for appellant.

It is a well recognized rule that delivery to a common carrier in the ordinary course of business constitutes delivery to the purchaser and in this case purchaser ordered the goods F. O. B. New Orleans, which was an instruction to the appellant to deliver same to the carrier. The supreme court of Mississippi in the case of *Planters' Oil Mill Co.* v. *Falls,* reported in 29 So. 786, has stated this rule as follows: "As between seller and buyer, goods ordered of the seller by the buyer are to be considered as delivered to the latter when they are delivered to a common carrier for transportation to him."

We do not contend that the seller (appellant) was compelled to follow but one course but that he had his choice of three courses; he may complete the contract on his part and sue for the contract price, or he may treat the contract as ended, retain the property and sue for the difference between the market value and the contract price, or he may sell all property at public or private sale for the best price he can obtain and sue for the difference between the price realized and the contract price. In this case the appellee contends that appellant had no legal right to follow the course he selected but that he should have sued for damages incurred by the purchaser's breach of the contract after he (the appellant) retained the goods. Appellee was wrongfully sustained in this contention by the lower court, in the case of *Crawford* v. *Avery,* 35 Miss. 205, the court said: "again; it is insisted, that under the facts stated in the declaration, the action could not be maintained for the price of the gin but that at all events, it should have been brought to recover damages for the non-performance of the special contract of the defendant. It is undoubtedly true, as a general rule, that if the seller is ready and offers to deliver the article as agreed to be furnished at the time and place stipulated in the contract, and the other party refused to accept it, the vendor may recover the price agreed to be paid."

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This decision, we contend clearly sets down the rule to be followed in this case for in this appellant chose the first of the three remedies. He completed his part of the contract and sued for the contract price and this remedy has been positively allowed him by the courts of Mississippi.

In *American Cotton Co.* v. *Herring,* reported in 84 Miss. 693, the court lays down this rule in the following language towit: "The rule seems to be settled that there are three methods of arriving at a proper measure for damages on a breach of a contract of this kind: (1) the seller may complete the contract on his part and recover the contract price; (2) he may treat the contract as ended, retain the property as his own and sue for the difference between the market value of the cotton and the contract price; (3) he may sell the cotton at public or private sale, for the best price he can obtain and sue for the difference between the price realized and the contract price.

This rule is set forth in Benjamin on Sales (6 Ed.), pp. 744, 776, and also in Tiedman on Sales, sec. 333, et seq.

The appellant in this case elected to complete his part of the contract he delivered the underwear to the carrier as directed by the appellee and then sued for the contract price and his action in so doing has been upheld by the supreme court of the state of Mississippi in cases cited in this brief and I have been unable to find a Mississippi case which held otherwise.

H. B. Everitt, for appellee.

It is a well-settled rule of law in cases of this kind, that a buyer may not breach his contract without paying the penalty or the price as the case may be; if the goods are delivered to the buyer, the seller has a right to sue for the price in spite of the refusal on the part of the buyer to receive or accept, when that is the breach of the contract complained of. But when the order is countermanded before the goods are shipped

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or delivered there is immediately a breach of contract and the seller may sue for his damages occasioned by such breach, but under the rule that one damaged by breach of contract may not thereafter increase his damage and claim such increased damage and he cannot sue for the purchase price of the goods without delivery. A case directly in point is that of *Sinka* v. *Chatham et al.*, 2 Tex. Civ. App. 312, 21 S. W. 948, which was decided by the supreme court of Texas in 1893. Citing the cases of *Tufts* v. *Lawrence,* 77 Tex. 526, 14 S. W. 165, and *Gammage* v. *Alexander*, 14 Tex. 419. See. Southerland on Damages, 359; see, also, Southerland on Damages, 361; *Falk* v. *Richardson,* a Florida case reported 47 So. 666.

The rule as to the measure of damages in this case is quite clearly explained in case of *Roehm* v. *Horst,* 178 U. S. 1221, 20 Sup. Ct. 780, 788, 44 L. Ed. 953 and *Hopkinville Milling Co.* v. *Gwin et al.* (Ala.), 50 So. 270, and same case again before that court in 67 So. 382, where the court states the rule to be in a case much like this; in fact, the court saying where a buyer repudiates the contract and refuses to receive and accept the goods, the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery.

It was insisted in the lower court that the goods in this case were delivered by delivery to the carrier and authorities were cited to the effect that where such delivery was made by way of making an actual delivery to the purchaser, the seller may sue *in assumpsit* for the contract price but the court very properly held that the attempt to make delivery of these goods by delivery to the carrier after the order was repudiated was not only a wrongful increase of damage by the seller but was not a delivery to the purchaser.

I find very few cases of litigation over a state of facts like those in this case in all of the great volume of business that is done in this country by orders taken and filed, changed and countermanded just as was done here. It is

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manifest that as a business proposition there is nothing to be gained by such an attempt to enforce such contracts by such method. It is true the seller may in such case sustain some damage but where the goods are not to be manufactured but are kept in stock and it is merely a matter of delivery, the damage to the seller occasioned by a countermand of such order is merely nominal. But if the seller be disposed to be spiteful or vengeful in spirit, it would often occur in such case, even where he had suffered no damage at all, to inflict upon his customer very heavy loss and damage. In casting about for a just rule of law to be applied to such a situation, it is perfectly manifest that the rule for keeping damage down devolving upon the seller in such cases, would present an effective barrier for the protection of an unfortunate buyer against the infliction upon him of needless damage, and at the same time having due regard for the rights of the seller in the matter of his damages actually incurred. In other words in such cases the seller must stop where he is and accept the damage due him at that time and under conditions then existing and by this rule the best interest of business and society will be conserved.

ETHRIDGE, J., delivered the opinion of the court.

Walker Bros. & Co., Limited, is a corporation under the laws of Louisiana engaged in the mercantile business in the city of New Orleans. On or about the 12th day of March, 1915, through its salesman, appellant sold a bill of goods to the appellee Daggett, the goods to be shipped at different times f. o. b. New Orleans; the order being verbally given and not signed in writing. A portion of the goods were delivered and accepted by Daggett, but the goods involved in this litigation, amounting to ninety-eight dollars and forty cents, were delivered to the Louisville & Nashville Railroad at New Orleans and sent to Pascagoula, Miss., consigned to the appellee, who refused to take the goods from the depot or pay for them. It appears from the correspondence that the appellee under-

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took to cancel that part of the order involved in this suit, but the appellee refused to cancel the order and shipped the goods as per contract. Defendant refusing to take the goods or pay for them, suit was brought in a justice court and judgment rendered for the appellant. The case was appealed by the appellee to the circuit court, where a jury was waived and the cause submitted to the circuit judge on agreed statement of facts, and the circuit judge found in favor of the appellee, and an appeal was prosecuted here.

The appellee, having accepted and paid for a portion of the goods ordered, is bound by the contract given the salesman, even though not in writing. We think the delivery of the goods to the common carrier, the railroad company, was a delivery to the appellee. *Planters' Oil Mill Co.* v. *Falls*, 29 So. 786.

It is insisted by the appellee that the appellant after receiving the notice that the appellee would not accept and pay for the goods that the goods should not have been shipped but should have been sold and the damages would be the difference in the sale price and the contract price, and that the appellant needlessly increased his damages by shipping the goods after such effort on the part of the appellee to cancel the order. We think the appellant had the right to ship the goods according to his contract and sue for the contract price. This seems to be settled in this state. See *American Cotton Co.* v. *Herring*, 84 Miss. 693, 37 So. 117, where this court, in dealing with a similar proposition, laid down the following rules:

"The rule seems to be settled that there are three methods of arriving at a proper measure for damages on a breach of contract of this kind: (1) The seller may complete the contract on his part and recover the contract price; (2) he may treat the contract as ended, retain the property as his own, and sue for the difference between the market value of the cotton and the contract price; (3) he may sell the property at public or private sale for the best price he can obtain, and sue for the difference between the price realized and the contract price."

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It is agreed in the agreed statement of facts that the goods were worth as much at the time they were tendered as at the time the order was taken. There being no dispute as to the value of the goods, it follows that the court below should have rendered judgment for the ninety-eight dollars and forty cents, together with the interest and damages. Accordingly judgment will be rendered here for the ninety-eight dollars and forty cents, with ten per cent. damages thereon, and six per cent. interest from date of judgment in justice court.

Reversed, and judgment here.

ON MOTION TO REMAND.

The appellee moves the court to set aside the order of court entering judgment here, and to remand the cause, because the appellant, pending the appeal in this case, and after the judgment of the court below, had the goods involved in the suit and tendered to the appellee removed from the warehouse of the common carrier and returned to New Orleans, and converted said goods to their sole use and benefit without the knowledge or consent of appellee. In this attitude of the case, we think it proper to sustain the motion and reverse and remand the cause.

The motion is accordingly sustained.

HATTIESBURG HARDWARE CO. v. PITTSBURG STEEL CO.

[76 South. 570, Division A.]

1. APPEAL AND ERROR. *Record. Conclusiveness.*
The recitals in a judgment, on appeal therefrom, must be supported and are controlled by the record.

2. APPEAL AND ERROR. *Review. Reversal.*
Under Code 1906, section 2683, so providing, suit may be brought against one, some or all of persons jointly and severally liable, and since partners are jointly and severally liable, error in rendering judgment against several partners, two of whom were not

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served with process and did not appear, does not require a reversal as to the partner who was served, in view of section 4944, providing that one appealing party is not entitled to a reversal for error as to another party defendant.

APPEAL from the circuit court of Forest county.

HON. P. B. JOHNSON, Judge.

Suit by the Pittsburg Steel Company against M. J. Fairley and others, doing business as partners under the firm name of the Hattiesburg Hardware Company. From a judgment rendered, all the defendants except Dan Fairley appeals.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellant.

The record shows upon its face that the Hattiesburg Hardware Company is a partnership composed, according to the allegations of the declaration and the recitals in the process issued thereon of M. J. Fairley, E. R. Fairley, Dan Fairley and Neil Fairley; and that service of process was had only upon M. J. Fairley and none of the others, and there was no appearance by either of the other three, E. R. Fairley, Dan Fairley and Neil Fairley; the record further shows upon its face that all of the defendants are residents of the state of Mississippi. Notwithstanding these facts, judgment by default was rendered against all of the defendants; therefore, it is clear the judgment against E. R. Fairley, Dan Fairley and Neil Fairley are void and this appearing upon the face of the record, it was error in the court to dismiss the appeal. 23 Cyc., page 1241, title, Judgments Subject Parties not Served with Process: A person is not bound as estopped by a judgment, although he was formerly made a party to the action in which it was rendered, if the court never acquired jurisdiction of him by the service of effective process or by his voluntary appearance." *Inglehard* v. *Sutton,* 7 How. (Miss.) 99.

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If the court will examine the record it will find that M. J. Fairley was the only defendant named who was served with process and was the only defendant who was named and who appeared in any proceedings filed by the defendant.

The concern being a partnership and all of the defendants being residents of the state of Mississippi, the judgment rendered against M. J. Fairley, who was served with process and who did appear, is not, under the statute of the state of Mississippi, binding upon the partnership assets, and is not binding upon M. J. Fairley.

Section 3935 of the Code of 1906, is as follows: "In actions against partners, some of whom are nonresidents of this state or cannot be found, service of process on such partners as may be found in this state, shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individuals summoned.

W. S. Welch, for appellee.

The case seems to have a rather checkered course; the companion case, of the same style between the same parties was dismissed in this court on the motion of the appellee and that judgment has been satisfied. A motion to dismiss the appeal of the Hattiesburg Hardware Company in this particular case was overruled. Later the appeal was dismissed by the court of its own motion and thereafter the appeal was reinstated on application of appellant. The complaint made by the appellants, as we understand it, is not that they do not owe the note, but that process was not served on all of the makers of the note, and that the judgment is void as to those parties of the Hattiesburg Hardware Company who were not served with process, and is void as to them, for want of process, is also void as to the partnership entity and the individual member of the firm who was served with personal process. We observe, with a great deal of surprise, the

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statement of counsel for the appellants that he does not pause to cite any authority in support of a proposition so elementary. In the first place, as we understand the rule, the appearance of the several defendants to object to the plaintiff's proceeding without giving security for court cost was a waiver of any irregularity or defects in the process and was an appearance for all purposes. This court has recently held in a number of cases that an appearance for any purpose whatever is an appearance for all purposes.

We respectfully refer the court to the recitation of the judgment in this case as to the appearance of the defendants.

But even if the defendants had not appeared in the case, this being a suit against a partnership and the individual members thereof, the judgment would be valid and binding as to the individual who was served, and this individual being the manager in charge of the business of the Hattiesburg Hardware Company and the maker of the note in their behalf, certainly the judgment would bind the partnership assets.

To us, it appears manifest that this is one of the numerous cases where debtors appealed to this court for no other reason whatever than to gain additional time in which to meet their obligations.

SMITH, C. J., delivered the opinion of the court.

This is a suit *in assumpsit* instituted by appellee against M. J. Fairley, E. R. Fairley, Dan Fairley, and Neil Fairley, alleged to be doing business as partners under the firm name of Hattiesburg Hardware Company. Upon the filing of plaintiff's declaration a summons was duly issued for defendants; the return of the sheriff thereon being that:

"I have this day executed the within writ personally by delivering to the within named M. J. Fairley a true copy of this writ this 23d day of October, 1915."

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The cause came on to be heard in due course in the court below, and a judgment by default was rendered in favor of the plaintiff, which judgment recites that:

"Defendants were solemnly called three times, but answered not, and it appearing to the court that the defendants had each been duly served with personal process more than five days before the return day hereof, and that they have made no defense to the said suit, other than to appear and require security for cost, and the said demand having been complied with by the plaintiff and the defendants failing to plead or make further defense whatever to the said suit, judgment by default is awarded plaintiff."

Section 940 of the Code provides that a plaintiff may be required to give security for costs on the motion of any party interested, supported by an affidavit of certain facts; but this record contains no such motion or affidavit, neither does it contain an order of the court requiring security for costs to be given, though a bond therefor was in fact executed by the plaintiff. This appeal is by M. J. Fairley, E. R. Fairley, and Neil Fairley; Dan Fairley not having joined in the execution of the bond therefor.

The recitals in a judgment, on appeal therefrom, must be supported and are controlled by the record (*Pouns* v. *Gartman et al.*, 29 Miss. 133; *Steele* v. *Palmer*, 41 Miss. 88; *Barker* v. *Shepard*, 42 Miss. 277), from which it appears that appellants E. R. Fairley and Neil Fairley were not served with process and did not enter their appearance.

This error, however, does not, under section 4944, Code 1906, require the reversal of the judgment as to appellee M. J. Fairley, for the reason that the liability of the alleged partners to appellee is not joint, but is joint and several. Code 1906, section 2683.

In so far as it affects appellants E. R. Fairley and Neil Fairley, the judgment of the court below will be reversed, and the cause remanded; but in so far as it affects appellant M. J. Fairley, it will be affirmed.

Affirmed.

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HESSIG-ELLIS DRUG CO. v. WILKERSON ET AL.

[76 South. 570, In Banc.]

1. CORPORATIONS. *Failure to report organization. Liability as partners. Statute.*

Notwithstanding a corporation on account of its defective organization in failing to report to the secretary of state in thirty days after its organization is only a *de facto* corporation and notwithstanding its right to do business as such is questionable only by the state in a direct proceeding, this does not relieve its stockholders from liability to its creditors under Code 1906, section 930, providing that should such report be not made within thirty days from the time of the organization, the charter granted shall be null and void and all persons doing business thereunder shall be deemed and held to be partners and liable as such.

2. CORPORATIONS. *Failure to report organization. Liability of stockholders as partners. Statute. Doing business.*

Under Code 1906, section 930, providing that all persons doing business under the charter of a corporation whose organization is not reported to the secretary of state in thirty days after its organization, shall be deemed to be partners and held liable as such, the stockholders of such corporation including one who bought his stock after the company had lost its right to do business because of its failure to report the organization to the secretary of state are liable to creditors since all did the business of the corporation in contemplation of law as well as its officers and agents.

APPEAL from the circuit court of Warren county.

HON. J. O. S. SANDERS, Special Judge.

Suit by Hessig-Ellis Drug Company against R. C. Wilkerson and others. From a judgment against plaintiff, it appeals.

The facts are fully stated in the opinion of the court.

J. C. Catchings, for appellant.

The learned special judge, as shown by his opinion, adopted the view expressed by the demurrer filed on be-

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half of Mr. Wilkerson. The theory of that demurrer is that the purchase by Mr. Wilkerson of stock was no purchase of stock at all in fact, for the reason that there was no corporation in which stock could be held. So the conclusion of the demurrer is that Mr. Wilkerson really purchased nothing.

The learned Special Judge in his opinion states: "One who, after the charter has ceased to exist, by operation of law is induced to buy stock in the dead corporation, takes nothing by his purchase, nor does he, without doing anything more than that, render himself liable."

He limits the statute so that it places liability only upon "those who start out as the organizers and incorporators of the corporation who fail to report the organization."

The theory of the demurrer filed by Mr. O'Neil is entirely different. It concedes that Mr. O'Neil was a stockholder, but claims that he is not liable as a partner because he was an inactive stockholder, who did not participate in the organization of incorporation, or in the management or conduct of the business.

It would be entirely competent for persons to agree that a partnership should be formed between them, whose business should be managed and controlled by a president and directors just as in the case of a corporation. It would be entirely competent for them to agree that this partnership should issue shares just as a corporation issues shares representing the interest of each holder.

Such a partnership would have been a joint stock company, and a joint stock company can be created and organized under the laws of this state. 2 Cooke on Corporations, sec. 505; *Kosakowski* v. *People,* 177 Ill. 563; *Robbins* v. *Butler,* 24 Ill. 387. Now the persons doing business under that charter were those who held shares of stock which had been issued. It is not necessary in order to make the holders of the shares of the Marshall Drug Company liable as partners that they should have actually participated in the management of the affairs of the company as members of ordinary partnerships are

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supposed to do. This is for the reason that they have agreed by the structure of the business that it shall be transacted by certain persons selected for that purpose. When this charter became void because of the failure to make report of it there was a partnership left, which was in the nature of a joint stock association.

If these purchasers took nothing, they would have had no standing in the court to have asserted the *status* of the business as a partnership and their interest in it represented proportionately by the shares of stock held by them. When the statute speaks of those persons doing business under a charter so becoming null and void, it means and can only mean persons holding shares of stock in such a corporation. It is not limited to those who actively attend the meetings and vote at the elections held for officers, directors, and so on, or who actively participate by advice and counsel in the management of the business.

Persons buying the stock of the Marshall Drug Company after it had lost its charter by the failure to report, must be deemed to have had notice of that fact. They are required to take notice when they are dealing with what purports to be a corporation to such an extent as to call for an inquiry on their part as to whether all conditions precedent have been performed, the failure of which would render the charter null and void. They must be conclusively held to have known that there had been a failure to make report. This being the case, the presumption is irresistible that they paid into the partnership knowing it to be a partnership, and intending that their interest should be manifested by shares of stock. In fact, so far as the matter of equity goes if that is to be considered at all, the purchaser of stock in the Marshall Drug Company after its organization, did not occupy so favorable an attitude as those who acquired stock at the time of its organization; for the reason that when they bought, the corporation had ceased to exist, and the very

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slightest inquiry on their part would have advised them as to this.

McLaurin & Arminstead, for appellee.

The contention of R. C. Wilkerson is fairly set out, we think, in his demurrer, found on page 39. He simply contends that under section 230 of the Code of 1906, the corporation, the Marshall Drug Company, at the time he purchased, on the 2nd day of October, 1911, had by operation of law ceased to exist; that the charter was void, and that while all of the conditions obtained to make the concern after the thirty days were out, in which the organization could be reported to the secretary of state, a *de facto* corporation, yet when there was a failure to report within the thirty days, those doing business thereunder then became partners by virtue of said section. *Bank of Newton* v. *Simmons,* 49 So. 616. Section 930 specifically provides that should such report be not made within the time required, the charter granted shall be null and void, and it provides that all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such. The declaration shows that the organization of the Marshall Drug Company occurred on August 29, 1911. They had thirty days thereafter to report the organization and failed. The result was that on the 29th day of September the charter previously granted was null and void and all persons doing business thereunder were made partners in the business and liable as such. Now, this sentence in this section certainly means all persons doing business thereunder on the 29th day of September, 1911, were made partners, and it certainly means that by law there was created an unlimited partnership, not a joint stock company. All joint stock companies may be partnerships.

It is of but little advantage to search for precedents in other states. Innumerable decisions as to the effect

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on stockholders of defective organization of a corporation could be cited, but in each instance the result is controlled almost entirely by the language of the statute in the state where the corporation is sought to be organized. In other words we have not been able to find any statute in any other State exactly similar to section 930 of our Code. This section, however, has been construed by the supreme court of this state in the case of *Ragland* v. *Doolittle,* 100 Miss. 498. The case is not exactly parallel to the case at bar, because in the Ragland case it is shown that all of the defendants sought to be charged were of the original organizers.

Ordinarily a stockholder is not liable to a creditor where the creditor deals with the concern as a corporation simply because the corporation was defectively organized. All of the text books uphold this doctrine, and it is distinctly held in the case of *Gartside Coal Company* v. *Maxwell* by Mr. Justice BREWER, reported in 22 Federal Reporter 197, a general discussion of this question can be found by the court in 10 Cyc. under the chapter on Corporations —particularly near page 662. Also in Cook on Corporations (6 Ed.), chapter 13, page 627, et seq.

Appellant in his brief was driven to the position that the partnership created by operation of law was a joint stock company. This was necessary for the reason that there was no other way that appellant could contend that the purchaser of a certificate of stock would make the purchaser a member of the firm. But the difficulty about this is, it seems to us, Wilkerson never purchased a certificate of stock showing him to be a member of a joint stock company, in the first place, and in the second place, the effect, as we have stated, of the failure to properly organize the corporation is, after the thirty days are out, to create an unlimited partnership not a joint stock company.

We respectfully submit that the action of the lower court should be affirmed.

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Hudson & McKay, for appellee.

The first ground of Frank E. O'Neil's demurrer is that "the declaration states no cause of action." Under this general ground we shall discuss and submit the proposition that the Marshall Drug Company was and is a *de facto* corporation and, as such, not subject to the collateral attack made by this proceeding on its corporated existence. The Marshall Drug Company is a *de facto* corporation. 1 Thomp. Cor. (2d Ed.), section 226, 157 Pa. St. 59.

But let us go further and determine whether the failure to report its organization to the secretary of state prevents the Marshall Drug Company from being a *de facto* corporation. And, preliminarily to this inquiry, we take it that it will be readily conceded to be shown by the declaration that the failure to report its organization was purely accidental, wholly unintentional, simply an oversight; because no bad faith therein is pleaded and no possible lack of good faith can be imagined for failing to do that which was simple and without expense or trouble and the very thing they most desired to do.

"The statutory requirements for the organization of corporations are generally regarded as conditions precedent to the formation of a corporation, and a substantial compliance is necessary in order to constitute a corporation *de jure.* But in the nature of the case, and under the definition given if some step in the progress of the organization is unintentionally omitted, and the other requirements are present there will be a corporation *de facto.* The accidental failure to comply with some legal requirement is one of the elements to the corporate existence *de facto;* otherwise it would be a corporation *de jure.*" 1 Thomp. Cor. (2d Ed.), sec. 234; *Mokelumne, etc., Min. Co.* v. *Woodbury,* 14 Cal. 424, 73 Am. Dec. 658; 32 Cal. 354; 84 Md. 320; 94 Tenn. 123; 22 Cal. 434; 13 Colo. 4; 85 Ky. 413; 88 Ky. 226; 62 N. H. 572; 4 Abb. N. C. (N. Y.) 444; 95 Mo. 106; 47 La. Ann. 1614; 30 Ore. 464.

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The Marshall Drug Company being a *de facto* corporation, "it is thoroughly established by the great weight of authority that the existence of this class of corporations is not subject to collateral attack. 1 Thomp. Cor. (2 Ed.), sec. 252.

We shall next discuss the remaining six grounds of Frank E. O'Neil's demurrer under the general proposition: That Frank E. O'Neil was a mere, inactive stockholder; and the declaration fails to plead or set out any facts, showing that he was doing business under the alleged avoided charter so as to render him liable to appellant.

Section 930 provides as follows: "Should such report of organization be not made (to the secretary of state) within the time required (thirty days after organization), the charter granted shall be null and void, and all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such." Now, in the light of the declaration, the all important words in the statute are "persons doing business thereunder." Under what circumstances can a person be said to be "doing business" under a charter? These do not appear to be technical words and must be given their common, ordinary meaning. At pages 1101 and 1102 of 9 C. J., the legal definition of the word "business" is given as "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." And Webster's dictionary is quoted as defining the word as "that which occupies the time, attention, and labor of men for the purpose of profit or improvement." *Ragland et al.* v. *Doolittle,* 100 Miss. 498.

We shall make no further reply to the brief for appellant than to observe that its argument is predicated of a merely supposed agreement among appellees and others to form a joint stock company. Such a supposition may serve to hang an argument on but it becomes wholly vain when it is but noted that there is in the record no pretense

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of such an agreement in the case at bar. Our statute does not make mere inactive stockholders liable.

"In some jurisdictions the doctrine that the adventurers of an attempted incorporation are liable as partners is denied on the ground that no such relation or liability was contemplated by them." 4 Thomp. Cor. (2 Ed.), sec. 4741; 4 Thomp. Cor. (2 Ed.), sec. 4745; 44 Cal. 440; 5 Colo. 282; 47 Conn. 443; 69 Ga. 156; 114 Mass. 476; 80 N. Y. 441; 22 Ore. 218; 29 Pac. 546; 29 Am. St. 596; 17 L. R. A. 549n; 1 Smith's Cas., 109.

If the persons who sign the articles of incorporation, and thereby directly participate in bringing the corporation into existence, are not liable as partners, then how can it be said that a mere, inactive stockholder could be held liable as such? 4 Thomp. Cor. (2 Ed.), sec. 4737; 91 Ala. 224; 8 So. 658, 24 Am. St. 887, 11 L. R. A. 515; 126 Cal. 541; 5 Colo. 282; 47 Conn. 443; 69 Ga. 159; 155 Ind. 60; 50 La. Ann. 3; 117 Mass. 476; 38 Mich. 779; 45 Neb. 176; 48 N. J. L. 599; 35 O. St. 158; 22 Ore. 218; 91 Ala. 224; 4 Thomp. Cor. (2 Ed.), sec. 4738.

We submit that the judgment of the lower court was eminently correct and should be affirmed.

SMITH, C. J., delivered the opinion of the court.

This suit was instituted by appellant to recover of appellees the price of certain goods, and merchandise sold by it to the Marshall Drug Company. A demurrer interposed to the declaration by appellees was sustained, and, appellant declining to amend, judgment final against it was rendered.

It appears from the declaration that on the 21st of July, 1911, a charter was obtained from the state by certain designated persons for a proposed corporation to be known as the Marshall Drug Company, which corporation was on August 25th thereafter in all respects duly organized, except that it failed to comply with section 930, Code of 1906, which requires that "every corporation organ-

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ized under this chapter shall, within thirty days after such organization make report thereof to the secretary of state," etc., and further provides that "should such report be not made within the time required, the charter granted shall be null and void, and all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such." Upon the organization of the corporation one hundred and fifteen shares of its capital stock were purchased by appellee O'Neil, and on the 2d day of October, 1911, five of its shares of stock were purchased by appellee Wilkerson. The company engaged, as it was authorized by its charter so to do, in the drug business at Vicksburg, and so continued until November 12th, during which time it purchased from appellant the goods, wares, and merchandise, the price of which is here sought to be recovered, and during which time appellees continued to hold stock in the company. Having failed to collect the amount alleged to be due from the company, this suit was instituted against appellees for the recovery thereof under the provisions of the statute hereinbefore referred to.

Two propositions are relied upon by the appellees in support of the judgment of the court below: First, that, notwithstanding its defective organization, the Marshall Drug Company was and is a *de facto* corporation, and its right to do business as such can be called in question only by the state in a direct proceeding instituted for that purpose; second, the declaration shows on its face that appellees were neither the organizers of the Marshall Drug Company, nor were they officers, agents, or employees thereof, but, on the contrary, were mere inactive stockholders, and therefore were not doing business under its charter within the meaning of the statute. It is further contended for appellee Wilkerson that he never became a stockholder in the corporation and cannot be said to have been doing business under its charter, for the reason that his attempted purchase of stock therein occurred

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more than thirty days after the corporation's organization, and, consequently, at a time when it had ceased to exist as such.

The first of these contentions, in so far as the liability *vel non* of appellees is concerned, is disposed of adversely to them by the express language of the statute.

We have been unable to discover any merit in the contention that the only persons who do business under the charter granted to a corporation are its officers and agents. The principal object sought to be accomplished by the creation of a corporation is that those persons who become stockholders therein may do business under the restricted liability imposed by its charter. The business in which a corporation is engaged belongs, in the last analysis, to its stockholders, who are entitled to receive all the net profits realized therefrom; the officers of the corporation being in reality only the agents of the stockholders for conducting the business.

It is true that, when appellee Wilkerson purchased his stock in the Marshall Drug Company, it had lost its right to do business as a corporation; but nevertheless he thereby acquired an interest in the business in which the company was engaged, and thereafter, with his associates therein, continued to conduct the same under the company's void charter, so that he comes within the express language of the statute and must be held liable.

Reversed and remanded.

SYKES, J. (dissenting). I cannot agree with the opinion of the majority of the court in this case. Section 930, Code of 1906, in part says:

"And all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such."

My construction of this clause is that, before any one is liable under it as a partner, he must be actively engaged in the management of the business, and not a mere dormant, silent, or inactive stockholder, who has nothing

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whatever to do with the active management of the business. If there were a board of directors in charge of this business, then, under the statute, they would be liable. If the stockholders had intrusted the management of the business to one or more of their number, then those stockholders in charge of said business would be liable. The declaration in this case does not charge that either of the defendants was engaged in operating the business of the drug company.

In my opinion, the judgment of the lower court should be affirmed.

HOLDEN, J.., concurs with me in these views.

McNEAL v. STATE.

[76 South. 625, Division A.]

1. HOMICIDE. *Manslaughter. Sufficiency of evidence.*
Under the facts as set out in its opinion, the court held that the trial court should have set aside the verdict and granted defendant a new trial because the verdict was contrary to the overwhelming weight of the testimony.

2. HOMICIDE. *Self defense.*
If a defendant's life was in real or apparent danger at the hands of deceased, and he believed it, then he had a right to shoot to kill.

3. HOMICIDES. *Justifiable homicide. Preventing felony.*
If a defendant charged with homicide believed and had reasonable ground to apprehend, a design upon the part of deceased, to violate the chastity of the women in his house, and that there was imminent danger of this design being accomplished, then he had the right to shoot the deceased.

4. HOMICIDE. *Dying declarations. Statement of fact.*
A dying declaration that defendant "shot me and didn't have any cause" is not inadmissible as merely an expression of an opinion but was the statement of a fact.

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5. Homicide. *Dying declarations. Competency.*
Where the state offers to introduce a dying declaration in evidence, the burden is upon the state to show that at the time the declaration was made, the deceased believed that he was going to die and had no hope whatever of recovery, it must be made under the realization and solemn sense of impending death.

6. Same.
Where deceased says nothing about death, but prays the Lord, "who had helped him before," his declaration is not admissible.

7. Same.
A statement, "I won't be with you much longer, I have got to leave you; O Lord, what a pity for Frank Neal to shoot a poor boy like I am for nothing. I never done anything to Frank"—was a mere exclamation of pity and was not admissible as a dying declaration.

8. Homicide. *Manslaughter. Instructions. Defense.*
An instruction for the state defining manslaughter as killing "in the heat of passion without malice," at a time when defendant was in no danger at the hands of deceased but omitting "without authority of law" was erroneous, where defendant relied not only on self-defense but also on the defense of killing to prevent a felony, as such an instruction might lead the jury to understand it as a practical exclusion of the latter defense.

Appeal from the circuit court of Winston county.

Hon. H. H. Rodgers, Judge.

Frank McNeal was convicted of manslaughter and appeals.

Instructions Nos. 1 and 4, referred to in the opinion, are as follows:

"No. 1. The court instructs the jury for the state that they do not have to know the defendant is guilty before they can convict the defendant, but it is only necessary that the jury do believe from all the evidence in the cause beyond every reasonable doubt that the defendant is guilty, and if the jury do so believe from all the evidence in the case beyond every reasonable doubt that the defendant is guilty, then it is the sworn duty of the jury to find the defendant guilty as charged."

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"No. 4. The court charges the jury for the state that in trying this case you should not hunt for doubts, with the view of finding any excuse or apology for your verdict, nor should you indulge in such doubts as are merely conjectural or chimerical, but the doubts which ought to make you pause and hesitate, must be reasonable doubts, and they must arise out of the evidence or the want of evidence in the case. You are not required by the laws of the state to know defendant is guilty of the crime charged against him before you can convict him, and you should not hesitate to find that he is guilty before you are able to say outside of the evidence that he might have been innocent, but, after considering all the evidence in the case, if you believe beyond every reasonable doubt that he is guilty, you should discharge your duty fearlessly under your oaths and under the law and say so by your verdict."

Green & Green and *Geo. Richardson,* for appellants.

The rule is settled in this state that to make dying declarations admissible, the party must believe in his immediate and impending dissolution. *Lembeth* v. *State,* 23 Miss. 354; *Fannie* v. *State,* 101 Miss. 380; *Bell* v. *State,* 72 Miss. 507, 17 So. 232; *Ashley* v. *State,* 37 So. (Miss.) 960; *Sparks* v. *State,* 74 So. (Miss.) 124, reiterates and approves the rule in *Bell* v. *State,* 72 Miss. 507, *supra.*

Proof of the competency of the dying declaration must be made to the court, as a predicate, beyond a reasonable doubt. *Fannie* v. *State,* 101 Miss. *supra; Bell* v. *State,* 72 Miss. 507, *supra; Guest* v. *State,* 96 Miss. 872.

In *Jones* v. *State,* 79 Miss. 309, it is held: "The admissibility of a dying declaration is to be determined by the court, and where the declaration is manifestly the statement of an opinion, although in form one of fact, it is inadmissible." *Dee House* v. *State,* 94 Miss. 123; *Owens* v. *State,* 59 Miss. 549; *Gould* v. *Crawford,* 2 Pa. St. 90; 1 Wigmore on Evidence, 632.

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It is held in the *Lipscomb case,* 75 Miss. 559, that caution should be exercised by the court in admitting dying declarations, and as shown, *supra,* the proof of the competency must be made beyond a reasonable doubt.

Where the preliminary hearing establishing the predicate is in the absence of the jury, as here, it is error to admit evidence of the declaration without submitting to the jury the evidence upon which the admissibility was decided. 21 Cyc. 985-6.

The alleged declaration is condemned by *Norwood* v. *State,* 65 So. 851-2, where deceased said he was going to die, "and that they had met him down there to kill him without a cause, and just had it made up with each other to do so," and this the court held (p. 852) was not admissible as the statement of a fact attending the killing. This case is clearly applicable to the case here. *Ford* v. *State,* 73 Miss. 734; *Shehan* v. *Kearney,* 82 Miss. 702; *Wood* v. *State,* 58 Miss. 742.

Instruction No. 5, for the state undertakes to instruct the jury as to manslaughter. It is fatally defective in its definition of manslaughter under the statute, in omitting, under sections 1236-38, Code 1906, the words "without authority of law." *Ivy* v. *State,* 84 Miss. 264.

The court erred in modifying instruction No. 1 for the defendant. This instruction, as asked, asserted the right of McNeal to defend his home and the chastity of his family against the threatened action of Williams, and the court modified it by inserting, as a basis of this right that he "used such force as was absolutely necessary to prevent him from carrying such threats into execution." The instruction, as asked, did not require that McNeal should be allowed to use only such as was "absolutely necessary to prevent him from carrying such threats into execution," and we submit that the requirement that he should only use such force as was "absolutely necessary" was stating the rule too strongly against McNeal. *Staten* v. *State,* 30 Miss. 619.

We respectfully submit that on the facts of this case, appellant could not be convicted of any offense. We re-

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spectfully submit that there was no foundation for the verdict of manslaughter, and are at a loss to understand how the court, under the circumstances, could have inflicted a penalty of eighteen years upon this unfortunate appellant.

Wherefore the judgment should be reversed and a new trial awarded, or that appellant be discharged.

Frank Robinson, for appellee.

While it is essential to the admissibility of dying declarations, that they were made under a sense of impending dissolution and this must be satisfactorily established to the judge before being admitted, yet it is not necessary that the declarant should state that they were so made at the time. It is sufficient if it be satisfactorily shown in any manner, that they were made under the sense of impending dissolution, whether it be proven directly by the language of the deceased, or be inferred from his evident danger, or the opinions of the physicians or other attendants, stated to the deceased, or from his conduct or other circumstances of the case. *McDaniel* v. *State,* 8 S. & M. 401, 47 Am. Decisions 93; *Brown* v. *State,* 34 Miss. 433; *Bell* v. *State,* 72 Miss. 507, 17 So. 232; *House* v. *State,* 94 Miss. 107.

It is argued by able counsel for the appellant when the deceased was praying and stated that the Lord had helped him once and he would help him again, that this showed that he had hope of recovery. I do not think that this showed that this expression could be strained to mean this, especially in view of the fact that there is not a solitary line of other testimony to show that the deceased had, at any time, ever thought that he would recover. In the case of *Dee House* v. *State,* 94 Miss. 107, one of the leading cases in this state on dying declaraion, the declarant stated, "that he was going to die; that he believed he was, and would like to see his wife before he died; that 'if I have to die, I want to die brave.' He said that Dee House had killed him and killed him without cause."

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Counsel in that case, as in this, argued that the use of the words, "if I have to die" by deceased raised a reasonable doubt of his entire conviction of impending dissolution. So taking into consideraion, the condition of Bill Williams, the deceased, in the case at bar, as testified to by Winfred Thomason and Mrs. Williams and Dr. Sanders, I think a proper predicate was laid for the introduction of the dying declaration.

As was said in *Dee House* v. *State, supra*: "Taking into consideration all that deceased said and the condition under which his declaration was made, we think deceased was fully conscious that his end was at hand and that his declaration was made under the realization and solemn sense of impending death, and therefore hold that the proper predicate was laid." *Wiltcher* v. *State,* 54 So. 726.

It is illegal for the court to submit to the jury by charges questions of fact on which the admissibility of dying declaration depend. The point is further made that the dying declaration was not a statement of facts but a conclusion by the declarant, and that such a declaration is condemned by the case of *Norwood* v. *State,* 65 So. 851. This as an Alabama case. The test as to the admissibility was well stated by the court in the case of *Dee House* v. *State, supra,* on page 123, as follows: "To us the true and proper test as to admissibility is whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible."

The statement that accused shot the deceased "without any cause whatever" is admissible. *Payne* v. *State,* 61 Miss. 161; *Powers* v. *State,* 74 Miss. 777, 21 So. 657. The assertion of the deceased that the accused killed him for nothing was properly received as a dying declaration. *Jackson* v. *State,* 94 Miss. 83, 47 So. 502. When everything, as shown by all the evidence, was fully known to the declarant his dying assertion that the accused "killed me and killed me without a cause;" may be accepted as the

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statement of a fact and be received in evidence. *House* v. *State,* 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840, note.

The fifth instruction for the state in as follows: "The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in the heat of passion, without malice, at a time when he was in no danger, real or apparent, of losing his life or of receiving great bodily harm at the hands of the deceased, you will find him guilty of manslaughter, and the form of your verdict will be: 'We, the jury, find the defendant guilty of manslaughter.'"

Complaint is made of this instruction because it omits the words, "without authority of law" found in the statutory definition of manslaughter. Sections 1236-1238, of the Code of 1906. This case was reversed because of the improper omission of certain testimony, though the court did state that the instruction for the state ought to have contained the words "without authority of law." It does not by any means follow that the court would have reversed the case if the only proposition before it had been the defective instruction.

The defense in this case was self-defense. The question as to whether the killing was with or without authority of law does not enter into the determination of the issues. It does not follow that the omission of such phrases in an instruction is necessarily reversible error. *Guest* v. *State,* 96 Miss. 871, 52 So. 211.

It has always seemed to me that the phrase, "without authority of law" would be surplusage in all definitions of manslaughter unless it might be that some officer were on trial for the killing of some person wherein the issue as to whether the killing was with or without authority of law might be involved.

Counsel for appellant argue somewhat at length that this case should be reversed on the facts. It might be that from a reading of the printed record, a judge could say that if he had been a member of the jury that tried the appellant, he would have reached a different conclusion. The appellant made out a very strong defense and I am

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unable to see just why the jury took the testimony of the state as true rather than that of the appellant's witnesses. It may have been due to the attitude and bearing of the witness on the stand, which is not possible for this court to see. However, this is not one of those cases where the testimony of the state is not sufficient to sustain the verdict of the jury if it is to be taken as true. I have no hesitancy in saying that so far as the facts are concerned, I do not think the record would warrant a reversal.

In conclusion, I submit that the dying declaration was properly admitted and that the instructions for the state were not erroneous, and that the facts as shown by the state are sufficient to warrant the verdict of the jury, and therefore I think the case should be affirmed.

Sykes, J., delivered the opinion of the court.

The appellant, Frank McNeal, was indicted for the murder of one Will Williams, and convicted of manslaughter, in the circuit court of Winston county. He was sentenced to serve a term of eighteen years in the penitentiary, from which sentence and judgment this appeal is prosecuted. There are a great many errors assigned as cause for reversal, but our view of the case only renders it necessary for us to notice those below mentioned.

One of the grounds assigned for a new trial in the motion therefor, and assigned here as error, is that the verdict of the jury was contrary to the law and the evidence. In considering this ground it is necessary for us to review, somewhat in detail, the material testimony in the case.

The undisputed testimony is that Bob Albritton had hidden a quart bottle containing about a pint and a half of alcohol in a field, and on the Sunday morning of the tragedy Albritton borrowed from the appellant a mule and then got the deceased, Will Williams, to accompany him in a search for this bottle. When they found it Albritton and Williams took several drinks, and then went to the house of McNeal to return the mule. Williams rode the mule, and Albritton walked with him. On arrival at McNeal's

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house, Albritton took a seat upon the gallery, where there were several women, among them Mrs. McNeal, wife of appellant, Mrs. Albritton, wife of Bob Albritton, and her daughter, and Mrs. Johnson, a sister of McNeal. McNeal and Williams went to the lot together to put up the mule. The women having noticed that both Williams and Albritton were drinking heavily, if not then drunk, one of them, Mrs. Johnson, asked Albritton at that time to get Williams away from the house, as they were afraid of him. On the arrival of Williams and Albritton at the house, McNeal was there with the women, making preparation to take his sister, Mrs. Johnson, to her home. Albritton persuaded Williams to leave at that time, and these two proceeded to Albritton's house, which was about two hundred yards from that of McNeal. Shortly thereafter, Albritton and Williams returned to McNeal's house. They both seemed to be more under the influence of drink than on the first visit. The testimony shows Williams was staggering at the time.

The uncontradicted testimony here shows that Williams, over the protest of the women, and especially of Mrs. McNeal, entered the house, and in doing so pushed Mrs. McNeal forcibly away from the door of the room in which was McNeal. The testimony is somewhat contradictory as to whether or not Williams cursed and abused the women and McNeal while he was in the room. The witnesses who were in the room at the time he was there testified that he was cursing and generally boisterous in the room. The other witnesses testify that they did not hear him cursing while in the room. Mrs. Johnson went out to where Albritton was, and asked him a second time to see if he could not get Williams away from the house. Albritton and his wife and a Mr. Sullivan got Williams and persuaded him to leave the house. Mrs. Albritton proceeded down the road some distance with him, and testified that Williams told her he would not return to McNeal's house if she would go on away. She then left Williams and the men who were with him and returned to the house. Mr. Sullivan also soon left Albritton and Williams

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and returned to the house. Williams and Albritton then went to an old house about a quarter of a mile away from the McNeal house. The view between these two houses is obstructed. While Williams was in the room with McNeal, the uncontradicted testimony shows that McNeal was shaving, and that he tried to persuade Williams to leave and not disturb the women.

The testimony is somewhat conflicting as to when the defendant, McNeal, first got his pistol. The testimony of some of the women is that when they saw Albritton and Williams returning to the house a second time, upon the suggestion of some of them Mrs. McNeal hid the pistol, as they felt there might be some trouble at that time, and then later on she gave the pistol to McNeal. McNeal's testimony is that at that time he put the pistol in his pocket to prevent Williams from getting it in case he became violent. The three women witnesses, Mrs. Albritton, Miss Albritton, and Mrs. Johnson, testified that shortly after Williams and Albritton had entered this old house they heard Williams cursing very loudly, and stating that he was going back to McNeal's house and violate the chastity of all of the women there. This fact is contradicted to a certain extent by the testimony of Bob Albritton, one of the state's witnesses. Albritton was with Williams at this time. He states that Williams cursed and abused him, but at no time did he hear him threaten to return to McNeal's house, as testified to by the above witnesses in the case. The testimony of this witness, however, in our opinion, is not entitled to very much credence. An affidavit had been made against him for the murder of this same man. All the testimony in the case shows that he was drinking very heavily, if not completely drunk, during all of the disturbance. His testimony is negative all the way through. Facts that he should have known had he been sober he showed an uncertainty about in all his testimony.

The testimony of the defendant, McNeal, corroborated by all of the three women witnesses in the case, one of whom (Mrs. Albritton) testified for the state, is to the effect that when the women heard these threats of Wil-

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liams to return to the house, they requested McNeal to go down and see if he could not get Williams to go away. In pursuance of this request, McNeal went to where Williams was. His testimony is that he met Williams and Albritton returning to the house a short distance from the old house where they had been. The testimony of Albritton is that McNeal came to the old house where they were. McNeal's testimony is that after meeting them he persuaded Williams to return to the old house. While they were in this house, the uncontradicted testimony shows that Williams and Albritton engaged in a fuss, and Williams threw some of the alcohol in Albritton's face, and Albritton finally left. Shortly after this Williams and McNeal left the house, and Albritton joined them on the road in a few minutes, and he and Williams engaged in a fight in which Williams knocked Albritton down and kicked him, and Albritton then retreated rather hurriedly to the home of McNeal.

When McNeal and Williams came into view of the women at the McNeal house, all of their testimony and that of Sullivan's, which corroborates that of the defendant, is that Williams, with his left hand, had hold of McNeal's right arm; that Williams was cursing, saying that he was going to McNeal's house and carry out his threat against the chastity of the women there; that when they reached a distance of about fifty or sixty yards from the house, McNeal hollered to the women to run and get away from the house. When he did this some of the witnesses testify that they saw Williams, with his right hand, choke McNeal. Others did not see the choking, but all testify that Williams reiterated his intention of going to the house for the heinous purpose above stated, and then, while throwing his right hand to the hip pocket, cursed McNeal and told him that he would shoot him. At this time they testify that McNeal, with his left hand, drew his pistol from his right hip pocket, and shot Williams. The shot entered the right breast. Williams then dropped McNeal's arm and McNeal retreated by backing away from Williams. Williams advanced several steps

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and then turned and walked away, and McNeal returned to his home. Only one shot was fired.

The testimony above enumerated is not contradicted by a single eyewitness to the difficulty. The witness Albritton at that time was sitting on the gallery of McNeal's home. He contradicts this testimony to this extent only: He says that he did not hear Williams cursing and threatening the women. All three of the women witnesses and Sullivan, as well as the defendant, testified, however, to these facts.

Williams was subsequently carried home by the doctor with the assistance of several other men. The bed clothing upon which he was carried was lent by the defendant.

The testimony all shows that there was no ill feeling against Williams by McNeal; that McNeal was sober at the time; that when the women requested him to go down and try to get Williams away, he stated that he would do so; that he thought he could persuade him to go home and go to bed. Nowhere is it shown that he acted as a man in the heat of passion, or with ill feeling toward the defendant up until the time of the shooting. The defendant himself testified that he only shot Williams after Williams had stated that he was going to kill him, and he thought he was attempting to carry out this intention by throwing his right hand to his hip pocket. Both the men were in their overalls, and neither had on coats. The defendant testified that he did not know whether Williams had a pistol in his pocket or not, that he did not look to see, but that from his action and conduct he assumed that he had and that he shot to protect, as he thought, his own life. The defendant testified that just before the shooting, and while Williams had him by the right arm, he was doing what he could to persuade Williams to go home and not try to go to his house.

A witness was introduced for the state, who testified that a day or two after the killing he had a conversation with the defendant, in which the defendant told him that before Williams threatened to shoot him he, the defendant, already had his pistol in his left hand. This witness

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further testified that the defendant told him he did not shoot until he was satisfied Williams intended to shoot him. He was also told by the defendant about the threats Williams was making to violate the chastity of the women just preceding the homicide. The only contradiction in this testimony and that of the defendant was that he stated he understood the defendant to say he had his pistol in his hand before Williams threatened to kill him.

It was shown that McNeal and the deceased were only slightly acquainted; that there was no ill feeling between them; that the deceased was a large and powerful man, and was very violent when drinking; that he was physically a more powerful man than the defendant. The testimony further showed that the defendant's shirt and shirt sleeve were badly torn and his right arm bruised by the deceased.

At the time of the shooting it is to be remembered that the three women eyewitnesses and Mr. Sullivan, as well as the defendant, testified to the fact that the deceased, Williams, had hold of the defendant's right arm with his left hand, and at that time stated his intention of going to the defendant's house to violate the chastity of the women, and also stated that he would blow the defendant's brains out, and coupled these declarations with a movement of his right hand to his hip pocket. Only a part of this testimony is contradicted by any witnesses, and that part is the negative testimony of the witness Albritton, who, the testimony shows, was drunk, and that testimony of his was that he did not hear these threats of the deceased.

On this testimony as to the immediate homicide, we unhesitatingly say that the court should have set aside the verdict and granted the defendant a new trial because the verdict was contrary to the overwhelming weight of the testimony. If the defendant's life was in real or apparent danger at the hands of the deceased, and he believed it, then he had a right to shoot to kill. If the defendant believed, and had reasonable ground to apprehend, a design upon the part of the deceased, Williams,

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to violate the chastity of the women in his house, and that there was imminent danger of this design being accomplished, then he had the right to shoot the deceased.

The next error committed by the trial court was in failing to exclude from the consideration of the jury the alleged dying declaration of the deceased made Monday morning to the witness Thomason. In the preliminary examination as to the competency of this testimony before the court, the facts were not as fully developed as they were before the jury, viz. as to the exact time when the declaration was made, and the time when the deceased expressed the belief that he was going to die. In the testimony before the jury, however, this fact was fully developed. The alleged dying declaration was in these words:

"He said the boys—he never called any name—come up there and persuaded him off, and Frank shot him and didn't have any cause, and that he didn't do anything to him, and said now they got him."

There are two objections urged to the admissibility of this declaration: The first is that it was not made while the deceased was under the realization and solemn sense of impending death. The second is that it was not a declaration of the facts of the homicide, but merely the expression of the opinion of the declarant. As to the second question, we will say that the decisions in this state have gone as far as—and probably further than—those of the majority of the other states in construing declarations as facts. Statements that accused had shot the deceased "without any cause whatever" were held admissible in the cases of *Payne* v. *State,* 61 Miss. 161; *Powers* v. *State,* 74 Miss. 777, 21 So. 657. A statement that the accused had "killed him for nothing" was admittted in the case of *Jackson* v. *State,* 94 Miss. 83, 47 So. 502. Also, the statement that the accused "killed me and killed me without cause" was admitted in *House* v. *State,* 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840. While we think that these decisions carry the doctrine to its furthest extent, and we are not disposed to overrule these cases, we shall certainly extend the doctrine no further.

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On the other question, however, we think that the declaration was not admissible. The burden is upon the state to show that at the time the declaration was made the deceased believed that he was going to die and had no hope whatever of recovery. It must be made, as all our authorities hold, "under the realization and solemn sense of impending death." *Fannie* v. *State,* 101 Miss. 380, 58 So. 2; *Bell* v. *State,* 72 Miss. 507, 17 So. 232, and numerous other authorities.

The testimony of the witness Thomason shows that Sunday night, during conscious intervals which Williams had, he prayed to the Lord to help him, and said that the Lord had helped him once before when he prayed to him. Up until the time of this declaration, Williams had not expressed to this witness, or to any other witness so far as the record discloses, the thought that he expected to die. About an hour and a half after the declaration was made, this same witness testifies that it was then that the deceased told him for the first time that he was going to die. Before this declaration could have been admissible, it was incumbent on the state to have proven that at the time it was made the deceased must have believed in his immediate and impending dissolution. *Lambeth* v. *State,* 23 Miss. 354; *Bell* v. *State, supra; Fannie* v. *State, supra; Sparks* v. *State,* 133 Miss. 266, 74 So. 124. Proof of the competency of a dying declaration must be made to the court beyond a reasonable doubt before it is admissible is also held in the above authorities.

The witness Thomason testified that Mrs. Williams was in the room when the above declaration was made to him, but that he was not present during all the conversations between the deceased and his wife.

The court also admitted in evidence, over the objection of defendant, an alleged dying declaration made to Mrs. Williams, the wife of deceased, some time on Monday in the following words:

"I won't be with you much longer; I have got to leave you. O Lord, what a pity for Frank McNeal to shoot

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a poor boy like I am for nothing. I never done anything to Frank."

This alleged dying declaration is different from one testified to by the witness Thomason, as shown on its face. From this declaration it appears that the deceased believed he was going to die. It is inadmissible, however, because it does not purport to state the facts of the homicide, but is at most a mere exclamation of self-pity of the wounded man. It was error to admit either of the above alleged dying declarations.

Instructions Nos. 1 and 4, given the state, are assigned as error. The objection urged to instruction No. 1, however, is cured by the other instructions in the case. Instruction No. 4 has been repeatedly condemned by this court as being erroneous, but the court has uniformly declined to reverse a case merely for the giving of this instruction.

The giving of instruction No. 5 for the state was very serious error. It is as follows:

"The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in the heat of passion, without malice, at a time when he was in no danger, real or apparent, of losing his life, or of receiving great bodily harm at the hands of the deceased, you will find him guilty of manslaughter, and the form of your verdict will be: 'We, the jury, find the defendant guilty of manslaughter.'"

It omitted, however, therefrom the words "without authority of law." It is contended in the able brief of the assistant attorney general, Mr. Roberson, that the omission of these words from the charge could not have prejudiced the defendant's case before the jury because his defense was self-defense. It is true that he testified that he shot the deceased in order to protect his own life. He was, however, entitled to the further defense that he had the right to kill the deceased to prevent him from committing a felony upon the women as we have before specifically stated; and the omission of the words "with-

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out authority of law" from this charge may have been understood by the jury as a practical exclusion of this defense. Section 1230, Code of 1906, under subsection "f," states that it is justifiable to kill a human being "when committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished." *Staten* v. *State,* 30 Miss. 619.

In conclusion, it is our opinion that the lower court erred in admitting for the consideration of the jury the two alleged dying declarations of the deceased, in the giving of the fifth instruction to the state, and in not setting aside the verdict and granting the defendant a new trial because the verdict of the jury was contrary to the overwhelming weight of the testimony.

Reversed and remanded.

LOVIZA v. LYNCH, ADMINISTRATOR.

[76 South. 629, Division A.]

1. EXECUTORS AND ADMINISTRATORS. *Disputed claims. Sufficiency of evidence.*

   In this case, which was a dispute as to the allowance of a claim against the estate of a decedent, the court held that there was sufficient evidence to require the administrator to introduce evidence to overcome it.

2. LIMITATION OF ACTIONS. *Limitation applicable. Claims for board and services.*

   The statute of limitation of three years bars any claim against the estate of a decedent, that accrued three years prior to the date of his death.

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APPEAL from the chancery court of Warren county.
HON. E. N. THOMAS, Chancellor.

Suit by Josephine Loviza against Charles A. Lynch, administrator. From a decree disallowing plaintiff's claims, she appeals.

The facts are fully stated in the opinion of the court.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Warren county wherein the court, after hearing the testimony introduced by the appellant in support of her probated claim of one thousand two hundred dollars against the estate of E. C. Bundy, deceased, disallowed the claim on the ground that the evidence was not sufficient to support it, and from that decree on the facts this appeal is prosecuted here.

The testimony introduced before the chancellor in support of the claim of appellant showed the following state of facts: On the 12th day of December, 1914, an old man by the name of E. C. Bundy died, leaving a small estate of the value of about one thousand two hundred dollars. He had been sick, suffering from a cancer, for more than three years immediately prior to his death, and from which malady he fianally passed away. During the last three or more years of his life he lived in a small house owned by him near the boarding house of the appellant, Mrs. Josephine Loviza, in Vicksburg. And during these years of his sickness and malady, Mrs. Loviza furnished him his board by taking to him his meals three times per day, and bestowing upon him other attentions and assistance in his unfortunate condition. The deceased was a ship carpenter, and could command good wages when he was physically able to work, but for three or more years before his death, on account of the disease mentioned, he was unable to perform any services, and his income consisted alone of nine dollars per month paid to him for the rent of a

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small building near by, rented and used by the appellant, Mrs. Josephine Loviza. It also appears from the testimony of the three or four witnesses who testified for the appellant, Mrs. Loviza, that the deceased received the board from appellant for three or more years, and that he often said that he intended to pay Mrs. Loviza for the board furnished him as soon as he was able to work and earn the money. The three or four witnesses introduced by appellant were kinsmen of hers and lived on the premises with her and close by the house occupied by the deceased, Mr. Bundy, and had good opportunity of knowing personally for three or more years whether or not the appellant furnished the meals and board to Mr. Bundy, and whether or not the deceased paid her for same or any part thereof, and they also had the opportunity of knowing whether Mr. Bundy had worked or earned any money whatever during the three or more years prior to his death. They all testified in a reasonable and positive manner that the deceased had not performed any work or earned any money for three or more years before his death, and that he had not paid appellant any money for his board during this time, but that he had frequently, up to a short time before his death, said that he intended to pay appellant for the board as soon as he was able to work and earn the money with which to pay it. It appears that in 1912 the deceased deposited several hundred dollars in a bank at Vicksburg, which drew a small interest, all of which was credited to his account, and that this was the only bank account or money that he had during the three years prior to his death, except the nine dollars per month paid him as rent by appellant. It is also shown by the bank records and competent testimony that he drew out of this bank personally all of this money but about two hundred dollars, which remained in the bank at the time of his death, and was used by the administrator herein for burial purposes. It appears in the proof that the old man paid about thirty-three dollars per annum taxes

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on his property in Vicksburg, which during the last three years before his death would have amounted to about one hundred dollars. This one hundred dollars and the two hundred dollars used for burial expenses left in bank for the use of Mr. Bundy about fifty dollars for his personal expenses and medicine necessary for his sickness. This fifty dollars used during the three years and the nine dollars per month paid by the appellant, Mrs. Loviza, to him for the rent of the said house, shows that Mr. Bundy paid his incidental expenses, medicine and doctor's bills with an average of about ten dollars and eighty cents per month for the last three years of his life.

The testimony of the three witnesses introduced before the chancellor by the appellant, Mrs. Loviza, as to the nine hundred dollar board bill, appears to us to be positive and reasonable, and as it was unimpeached and undisputed, we do not see why the chancellor failed to give it any credence whatever. The record shows that this testimony was all in the shape of depositions and decumentary evidence, and that the chancellor had no way of determining the credibility or truthfulness of the testimony except by the depositions and documentary evidence alone, which depositions and documentary proof are before us and have been carefully reviewed and considered. When the appellant had submitted her proof and rested her case with the chancellor, we think that sufficient evidence was submitted, and that it was positive, reasonable, and plausible, and therefore was entitled to credence, at least to the extent of requiring the appellee administrator to introduce some testimony to overcome the proof as to the board bill introduced by the appellant. But appellee introduced no evidence whatever. The claim may appear suspicious in some respects, but this is not sufficient to entirely overcome and destroy the proof presented by appellant.

The item of nine hundred dollars for board is the only item in the probated claim that we think was suffciently

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proven by the testimony introduced by the appellant, Mrs. Josephine Loviza. The other items were properly disallowed for the obvious reason that it was not shown that these items were due, if at all, to appellant, Mrs. Loviza.

We do not pass upon the question of the reasonableness of the charge of twenty-five dollars a month for the board of Mr. Bundy for the three years immediately preceding his death, but so far as the proof stands now in the record this rate of twenty-five dollars per month is shown to have been probably reasonable. Of course, the statute of limitation of three years bars any claim in this case against the estate of the deceased that accrued three years prior to the date of his death. For the error pointed out above, the decree of the chancellor is reversed, and the cause remanded.

Reversed and remanded.

ARMSTRONG v. GULF & S. I. R. Co.

[76 South. 624. Division B.]

MASTER AND SERVANT. *Action for injury. Question for jury. Negligence and contributory negligence. Instructions.*

Where a carpenter working under the control and direction of a foreman, repairing bridges for defendant railroad company was returning from his work as usual on a motor car run by his foreman and while the motor car was running at a speed of some thirty-five miles an hour some one on the car gave the alarm that the car was approaching an open switch whereupon plaintiff and two others jumped off the car and was badly injured. In such case whether or not the motor car was being run at an excessive and negligent rate of speed under the circumstances, and if so, did the plaintiff have reason to believe and did believe that he was in great danger when he jumped from the car were questions which should have been submitted to the jury and a peremptory instruction for defendant should not have been given even though the motor car in fact entered the open switch safely.

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APPEAL from the circuit court of Rankin county.

HON. J. D. CARR, Judge.

Suit by L. R. Armstrong against the Gulf and Ship Island Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

S. L. McLaurin and *Hilton & Hilton,* for appellant.

Mayes, Wells, May & Sanders, for appellee.

COOK, P. J., delivered the opinion of the court.

The appellant sued the appellee railroad company for injuries resulting to him by the alleged negligent operation of a motor car. At the conclusion of the testimony offered by both sides to the controversy, the learned circuit judge, at the request of appellee, defendant below, peremptorily instructed the jury to return a verdict for the defendant. The jury returned the verdict thep were directed to return, and from the judgment on the verdict the plaintiff appeals to this court.

The facts disclosed by the record, briefly summarized, are as follows: The plaintiff was a carpenter, and belonged to a crew working under the control and direction of a foreman, repairing bridges of the appellee. This crew was transported to and from its work on a motor car weighing something like one thousand two hundred pounds. The motive power of the car was gasoline, and the car was operated by the foreman. Camp cars, for the feeding and housing of the crew, were located at Jackson. On the day the plaintiff was injured, the crew, aboard the motor car, were returning to Jackson from some point south of Jackson. The car was running about thirty-five miles per hour, according to evidence offered by plaintiff, when some one on the car discovered that they were approaching an open switch and gave the alarm, whereupon plaintiff and two others of the crew jumped off the car and plaintiff

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was seriously injured. The car passed through the switch safely, and, had the plaintiff remained on the car, he would not have been injured.

The appellant, plaintiff below, contends that it was negligence to run the motor car through the open switch at the rate of speed it was going; that the danger to the life and limb of plaintiff was reasonably apparent to any prudent person situated as he was, and, being confronted with this danger, he jumped to save his life. We think the evidence amply supported the theory of plaintiff, and, this being true, the court erred in its instruction to the jury. The evidence introduced by plaintiff tended to prove that, even though they had passed safely over the frog of the switch, the situation indicated that they would be wrecked when they reached the "derail" some distance further north. The defendant introduced witnesses to prove, and did prove, if believed, that there was no danger at all; that the plaintiff jumped when there was no danger, real or apparent; that the motor car was being operated with due care, and, in a word, plaintiff, at best, was the victim of his causeless timidity. So, in our opinion, the conflicting evidence presented the issue as to whether or not the motor car was being run at an excessive and negligent rate of speed under the circumstances and, if so, did the plaintiff have reason to believe, and did he believe, that he was in great danger when he jumped from the car?

Reversed ond remanded.

STATE v. WALKER.

[76 South. 634. Division A.]

LARCENY. *Indictment. Sufficiency. Dollar. Statute.*

Under Code 1906, section 1436, providing that in indictments for larceny or embezzlement of money, it shall be sufficient to de-

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scribe the property in general terms as money, etc., of or about a certain amount and of certain value, an indictment which charged that defendant stole seventy-seven dollars and fifty cents of the value of seventy-seven dollars and fifty cents which was the property of another, was sufficient to charge an offense, though not specifically alleging that the property stolen was money, since the description of it as seventy-seven dollars and fifty cents of the value of seventy-seven dollars and fifty cents, identified it as money, for when we speak of dollars and cents we are speaking of money.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, Judge.

Ella Walker was indicted for larceny and from a judgment sustaining a demurrer to the indictment the state appeals.

The facts are fully stated in the opinion of the court.

Earl Floyd, assistant attorney-general, for the state.

The first ground of the demurrer is that the indictment does not inform the defendant as to the nature of the accusation against her. The indictment complained of is based on section 1436, Code 1906, which is as follows:

"In indictments for larceny or embezzlement of money or evidences of debt, it shall be sufficient to describe the property in general terms, as money," "bank-notes," "checks," "bills of exchange," "promissory notes," and the like, of or about a certain amount and of certain value; and in an indictment for embezzlement of money or funds by a treasurer, cashier, or other fiduciary, it shall be sufficient to describe the same as a "balance of account" and "of a certain value." It is to be observed that the indictment apprises the appellee of the amount of the money stolen and the ownership thereof, and complies with every requirement of the statement of the statute quoted above. The place from which the money was stolen is in no way descriptive of the offense and need not be averred in the indictment. Before the en-

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actment of the above general statute it was not sufficient to describe money in general terms giving only the aggregate amount without any specifications of the denomination of the pieces, but with this statute it is unnecessary to describe the pieces of coin alleged to have been stolen, it being sufficient to designate it in general terms, giving only the amount and ownership. The effect of this statute dispensing with any description of money other than a simple designation as such puts this subject of larceny on a different footing from chattels and movables, the names or designations of which do not of themselves import value.

In the case of *Richburger* v. *State,* 44 So. 772, this court held that it was unnecessary under section 1436, *supra,* for the indictment to aver the value of the money, when a designated sum of money was alleged to have been embezzled, with the court saying that: "The charge against the defendant that he had embezzled eight thousand six hundred fifty-nine dollars and fifty-nine cents, by its very terms fixes the amount of money charged to have been embezzled; and the words 'amount' and 'value' when applied to money are synonymous."

However, in the case at bar it is to be observed that a separate averment was made as to value. It is unnecessary to aver that the money was lawful money of legal tender as the above statute dispenses with any requirment of the kind. "The word "dollars" means money in the form of the lawful currency of the United States. A dollar is a unit of our currency, and imports, to the common understanding, the meaning of a thing of value. While the term "dollar" may be used as descriptive of certain kinds of coin valued at one hundred cents each, yet the authorities hold that the word "dollar" in an indictment does not of necessity mean coin, inasmuch as in common parlance there are paper dollars as well as silver dollars. It has been held that the description of the amount in an indictment as a certain number of "dollars" was supported by proof, that it

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was United States bank paper for that amount. *Graham* v. *State,* 245 Humphrey 44, 81 Tenn. 40; 3 Words and Phrases, page 2161; 2 Words and Phrases (2 Series), page 127.

I respectfully submit that the court was in error in sustaining the demurrer in the indictment in this case, and that the judgment so holding should be reversed.

HOLDEN, J., delivered the opinion of the court.

This is an appeal by the state from a judgment of the circuit court of Leflore county sustaining a demurrer to an indictment wherein the appellee was charged with stealing seventy-five dollars and fifty cents. The indictment, leaving out the formal parts, is as follows:

"Upon their oaths present that Ella Walker, in said county, on the 16th day of January, 1917, seventy-seven dollars and fifty cents, of the value of seventy-seven dollars and fifty cents, of the property of Tom Steele, then and there being found, did then and there unlawfully, willfully, and feloniously, take, steal, and carry away, against the peace and dignity of the state of Mississippi."

The demurrer presents several grounds, and it does not appear in the record upon which ground the court sustained the demurrer, but we suppose it was sustained on the ground that the indictment failed to charge that the property stolen was "money." The indictment is based on section 1436, Code of 1906, which in part is as follows:

"In indictments for larceny or embezzlement of money or evidences of debt, it shall be sufficient to describe the property in general terms as 'money,' 'bank notes,' 'checks,' 'bills of exchange,' 'promissory notes,' and the like, of or about a certain amount and of certain value," etc.

While the indictment is drawn in an unusual way, and does not charge that the property stolen was "money,"

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still we think that it is a good indictment, as it charges all of the necessary elements and ingredients of the crime of larceny. It fully informs the defendant of the nature and cause of the accusation, the amount of money stolen, the ownership and value thereof, the time and place, and the felonious taking, stealing, and carrying away of the property. It is true the indictment does not use the word "money," yet it states that "seventy-seven dollars and fifty cents, of the value of seventy-seven dollars and fifty cents," was stolen. Certainly when we speak of dollars and cents we are speaking of money, and this description of the property is a substantial compliance with the requirments of the statute on larceny. *Graham* v. *State,* 5 Humph. (Tenn.) 40; Words and Phrases, vol. 3, p. 2161; Words and Phrases (2d Ed.), vol. 2, p. 127.

The judgment of the court below is reversed, and the cases remanded.

Reversed and remanded.

STATE v. EDWARDS.

[76 South. 635, Division A.]

ANIMALS. *Registration. Offenses. Statute.*

Under Code 1906, section 1055, providing that every dealer in live stock who shall fail to enter in a book the names of all persons from whom he buys, and a description by marks and otherwise of all animals bought or kept by him for slaughter, shall be punished, an indictment, charging that accused, then and there being a dealer in live stock, unlawfully failed to keep any record of stock bought or sold, and thereby did not enter the names of all persons from whom he bought such stock and a description by marks and brands or otherwise of all animals bought, is insufficient, where it was not alleged that defendant in fact bought cattle, sheep, etc., and failed to register the names of the persons from whom he bought them.

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APPEAL from the circuit court of Perry county.

HON. P. B. JOHNSON, Judge.

Allen Edwards was indicted for an alleged violation of Code 1906, section 1055, and a demurrer to the indictment being sustained, the state appeals.

The defendant was indicted under section 1055, Code of 1906, which is as follows:

"The Same; Butchers and Dealers to Keep Register, etc.—Every butcher or dealer in cattle, sheep, or hogs, who shall fail to enter in a book or register the names of all persons from whom he buys, and a description by marks, brands, and otherwise of all animals bought or kept by him for slaughter, or to allow an inspection of such entries at any time, by any person interested to make it, shall, on conviction, be imprisoned in the county jail not exceeding six months, or be fined one hundred dollars, or both."

The indictment alleges that:

"Allen Edwards, on the 3d day of April, 1916, in Perry county aforesaid, then and there being a dealer in cattle, sheep, and hogs, and buying the same, unlawfully failed to keep any record of the stock aforesaid bought and sold, and thereby unlawfully did not enter the names of all persons from whom he bought such stock and a description by marks, brands, and otherwise of all animals bought as aforesaid against the peace and dignity of the state of Mississippi."

The court sustained a demurrer to this indictment, and the state appeals.

Earl Floyd, for the state.

The first ground of the demurrer is that the indictment does not charge any crime known to the law. The second ground of the demurrer alleges the indictment to be insufficient in that it does not attempt to give the names of any person, or persons, from whom the defendant purchased stock, nor the kind of stock so purchased.

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The gravamen of the offense under the above statute is either failing to enter in a book or register the names of the persons from whom he buys and a description of the cattle bought, or to allow an inspection of such register by any interested party.

While the names of the persons from whom he bought cattle could have been inserted in the indictment and formed material descriptive matter, yet it is not necessary as a part of the indictment to insert such names. The gist of the offense is the failure to insert any name of the buyer or the description of the cattle bought, rather than the failure to enter any particular name of persons or description of cattle.

The third ground of the demurrer is that the indictment "charges defendant with the offense of failure to keep a book or register of the animals purchased, and also attempts to charge him with the offense of failing to enter the description of the stock so purchased in said register." The indictment alleges that he "failed to keep any record of the stock aforesaid bought and sold, and thereby unlawfully did not enter the name of all persons from whom he bought such stock, and a description by mark, brands and otherwise of all animals bought as aforesaid." It is to be observed that the mere allegation of a failure to keep a register is a sufficient averment in itself, that the names of the persons and the description of the cattle were not entered therein, as required by statute, but the indictment follows closely the words of the statute and alleges the failure to keep any record or register, and also a consequence thereof for failure to enter the names of the persons and the description of the animals. It is difficult to see what objection could be raised by this form of alleging the facts. Certainly the person indicted cannot claim that the language of the indictment did not apprise him of the accusation, and that being so, every legal requirement has been met.

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In the case of *Richberger* v. *State,* 44 So. 772, it was held that it was sufficient to charge a statutory offense in the words of the statute, or by the use of words synonymous therewith. *Harrington* v. *State,* 54 Miss. 490; *Roberts* v. *State,* 55 Miss. 421; Joyce on Indictments, section 371, *et seq.*

An indictment charging a statutory misdemeanor, as is the offense in this case, substantially in the language of the statute is generally sufficient, and it is said to be rarely necessary to do otherwise. Joyce on Indictments, section 389.

The fourth ground of the demurrer is that the indictment does not allege whether or not the defendant was a dealer in sheep, cattle or hogs. The demurrant assumes that the statute makes it necessary to allege that he was a dealer in only one of the classes of animals enumerated. The words "dealer in cattle, sheep or hogs" were intended to cover that class of persons dealing in any or all of such animals, but who did not come under the term of "butcher." It is, therefore, unnecessary to allege that he was a dealer in any particular class of such animals, as it would be sufficient to prove that he dealt in any one or more classes thereof.

I respectfully submit that the court below was in error in sustaining the demurrer to the indictment in this case and that its judgment should be reversed, and the case remanded.

SMITH, C. J., delivered the opinion of the court.

Under section 1055, Code of 1906, upon which this indictment is predicated, it is the duty of a butcher or dealer in cattle, sheep, or hogs, each time he purchases cattle, sheep, or hogs,to register the name or names of the person or persons from whom he buys, and each failure so to do is a separate offense. This indictment is drawn upon the theory that but one offense is committed by the failure of a dealer to register the names

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of all persons from whom purchases are made, and, moreover, while it alleges that the defendant was a dealer in cattle, sheep, and hogs, and did not register the names of persons from whom he bought, it contains no allegation that he, in fact, bought cattle, sheep, or hogs and failed to register the names of the persons from whom he bought them. The demurrer was properly sustained.

Affirmed.

MAY v. STATE.

[76 South. 656, Division A.]

1. NAMES. *Idem sonans.*
The words "bowles" and "bowels" are not *idem sonans;* the first being a word of one syllable and the second a word of two syllables. The different positions of the letter "l" in the two words make two entirely different words.

2. FORGERY. *Indictment.. Extrinsic explanatory facts.*
Where extrinsic facts are necessary to be known and considered along with the writing, in order to constitute forgery, an indictment therefor must set out such facts as well as the instrument itself.

3. SAME.
In a prosecution for unlawfully uttering a forged check signed "T. A. Bowels," the indictment alleging that the check was a forged check and that defendant intended to defraud certain parties, among others the bank on which the check was drawn and "T. A. Bowels," the indictment should have alleged the extrinsic explanatory facts that a person by the name of "T. A. Bowles, lived in another town and that defendant, when he cashed the check, told the person who cashed it that it was Bowles' check.

4. FORGERY. *Indictment. Variance.*
Where there is a variance between the indictment and the proof, a motion by the defendant to exclude the testimony of the state should be sustained.

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5. FORGERY. *Uttering forged instruments. Instruction. Statutes.* In a prosecution, under section 1192, Code 1906, for unlawfully uttering and publishing a forged check, an instruction for the state which, while attempting the statutory definition of the offense, omitted to state that the check was uttered "with intent to defraud" was erroneous.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, Judge.

Gibb May was convicted of unlawfully uttering and publishing a forged check and appeals.

The facts are fully stated in the opinion of the court.

Alfred Stoner, for appellant.

The instruction shown on page 32 of the record informs the jury that if they believe beyond a reasonable doubt that the defendant uttered or passed, or undertook to pass the said check, knowing it to be forged or counterfeit, then they should convict, etc. This instruction is very inaccurately drawn and clearly does not impart the correct law. The jury were not even informed that the check must have been uttered or published as true with the intent to defraud. It is evident that this indictment was found under section 1192 of the Code of 1906, which section is as follows: "Every person who shall be convicted of having uttered or published as true, and with intent to defraud, any forged, altered or counterfeit instrument, or any counterfeited gold or silver coin, the forgery, altering or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument or coin to be forged, altered or counterfeited, shall suffer the punishment herein provided for forgery."

No intent to defraud is mentioned in this instruction, nor were the jury informed that this check must have been published as true. Testimony as to whether Dr. Bowles signed the check was admitted when the question of the signature of Mr. Bowels was before the court, over the objection of the defendant, also as to whether Dr.

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Bowles carried an account with the Bank of Commerce. The facts do not prove nor tend to prove any fact concerning the signature of Bowels as alleged in the indictment.

"Where extrinsic facts are necessary to be known and considered, along with a writing in order to constitute forgery, an indictment therefor must be set out in the facts, as well as the instrument itself. Moreover, the persons whose names are forged to such a certificate must be trustees of the public schools, and this fact must be alleged and proved." *Griffin* v. *State,* 96 Miss. 309, 51 So. 466.

The indictment charged the defendant with an attempt to defraud T. A. Bowels, and of course, was not demurrable, since nothing on its face showed that Mr. Bowels would not be introduced to deny the signature.

"If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is void or not, a simple charge of forging it fraudently, etc., does not show an offense but the indictment must set out such extrinsic facts as will enable the court to see that, if it were genuine it would be valid." *France* v. *State,* 85 Miss. 687, 35 So. 313. We submit that on the authority of this case alone the case should be reversed.

In conclusion, we respectfully submit that this cause should be reversed and the defendant discharged from jail.

Gardner, McBee & Gardner, for appellant.

We respectfully submit that there is error in the record and that this case must be reversed because of the giving of the instruction at page 32 of the record, which is as follows:

"The court instructs the jury that in this case you do not have to believe that the defendant can read or write or that he forged the check in question; it is only necessary that you believe from the evidence in this case beyond a

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reasonable doubt that he uttered or passed or undertook to pass said check knowing the same to be forged or counterfeited, and if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Gibb May, did pass or utter or undertake to utter said check knowing it to be false, then you will find him guilty as charged.

The trouble with this instruction is that it disregards the intent necessary to be alleged and proven, and this, we submit, is fatal error.

In the instant case, is it necessary to allege a fraudulent intent? The statute upon which this indictment was found in section 1192 of the Mississippi Code of 1906. *Ivy* v. *The State,* 84 Miss. 265; *Rutherford* v. *State,* 57 So. 224; 19 Cyc. 1427; *Agee* v. *State,* 113 Ala.. 52, 21 So. 207; *Claiborne* v. *State,* 51 Ark. 88, 9 S. W. 851; *People* v. *Wyman,* 148 N. Y. 29, 42 N. E. 408; 12 R. C. L. 152; *State* v. *Sherwood,* 90 Iowa, 550, 58 N. W. 911, 48 A. S. R. 461; *State* v. *Weaver,* 149 Iowa, 403, 128 N. W. 559; Ann. Cases 1912C, 1137, 31 L. R. A. (N. S.), 1046.

We respectfully submit that the giving of the instruction above complained of is error. We think we have shown that it was necessary to allege and prove the fraudulent intent. We further submit that there is fatal error, in this: The prosecution proceeds along the line that the defendant sought to utter a check, which had been forged by some persons who attempted to forge the name of T. A. Bowles, a witness for the state.

Under the indictment in this case, all of this testimony was inadmissible. We do not mean to say that under a proper indictment it might not have been admitted, but, we do contend that in this case, it ought not to have been.

The attorney-general contents himself with the idea that the name "T. A. Bowles," as contained in the indictment is *idem sonans,* with T. A. Bowels.

In the first place, we submit as a matter of fact, this is not correct; one of these names being a word of one

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syllable and the other a word of two syllables. "*Idem sonans* means of the same sound or sounding the same." *State* v. *Witt,* 8 Pac. 769, 34 Kas. 488; *State* v. *Griffie,* 123 S. W. 878, 118 Mo. 188; *State* v. *Griffie,* 123 S. W. 878; *Brown* v. *Marqueze & Co.,* 30 Tex. 77.

In the light of the above authorities, we say that "Bowels" and "Bowles" are not *idem sonans. State* v. *Fay,* 65 Mo. 490; *Brown* v. *People,* 66 Ill. 344; *Porter* v. *State,* 15 Ind. 433; *McClellan* v. *State,* 23 Tex. App. 401, 5 S. W. 248.

In the above case there was in the names used, a difference in syllables, just as in the case at bar. That the indictment by proper allegations should explain the meaning of names when the name signed to a check is meant for another name, we cite: Section 327, Bishop on Statutory Crimes (3 Ed.); *Crawford* v. *State,* 40 Tex. Cr. R. 344, 50 S. W. 378; *Polk* v. *State,* 40 Tex. Cr. R. 668, 51 S. W. 909; 19 Cyc. 1405; *Russell* v. *State,* 40 So. 625; *Macguire* v. *State,* 91 Miss. 151.

We respectfully submit that for the reasons above given, this case should be reversed.

Frank Robinson, assistant attorney-general, for the state.

This indictment is based on section 1192, of the Code of 1906, which reads as follows: "Uttering false instrument, counterfeit coin, etc. Every person who shall be convicted of having uttered or published as true, and with intent to defraud, any forged, altered, or counterfeit instrument, or any counterfeit gold or silver coin, the forgery, altering or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument or coin to be forged, altered, or counterfeited, shall suffer the punishment herein provided for forgery."

The first error argued by counsel for appellant is, that the court erred in giving the following instructions for the state: "The court instructs the jury for the state,

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that you do not have to know that the defendant is guilty as charged in the indictment, before you can convict him; it is only necessary that you should believe from the evidence beyond a reasonable doubt that he is guilty. If you believe from all of the evidence beyond a reasonable doubt that the defendant is guilty, then it is your sworn duty to so find.

"The court instructs the jury that in this case you do not have to believe that the defendant can read or write or that he forged this check in question; it is only necessary that you believe from the evidence in this case beyond a reasonable doubt that he uttered or passed, or undertook to pass, said check knowing the same to be forged or counterfeit, and if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Gibb May, did pass or utter or undertake to utter said check knowing it to be false, then you will find him guilty as charged."

It is argued that the state relied for conviction on circumstantial evidence and this being true, that these two instructions are incorrect in that they failed to "exclude every other hypothesis of guilt" and the case *Permenter* v. *State*, 54 So. 949, was cited.

The argument of appellant is based on the false premises that the state relied on circumstantial evidence for a conviction. The evidence is not circumstantial, but is direct. The most damaging evidence to the appellant was the statements made to Mr. Schweig and Charlie Young, in which the appellant stated that Dr. Bowles had signed the check. The Permenter case, therefore is an inapt citation and has no application to the case at bar.

It is also argued that because of the variance between the indictment and the proof in the spelling of the name, this was fatal error. I submit that this variance was immaterial. The evidence for the state showed that the attempt of the appellant was to utter and forge a check of Dr. T. A. Bowles, and he even claimed to two of the state witnesses that Dr. Bowles signed the check. The name is

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idem sonans, and would sustain a plea of former jeopardy, if the appellant were indicted again on the other name.

The only question in the case was one of fact which the jury decided adversely to the appellant. I submit that the court committed no reversible error and that the case should be affirmed.

SYKES, J., delivered the opinion of the court.

The appellant, Gibb May, was indicted in the circuit court of Leflore county for unlawfully uttering and publishing as true a forged check for the sum of $4.00 drawn on the Bank of Commerce of Greenwood, Miss., and signed "T. A. Bowels."

He was convicted by the jury and sentenced by the judge to serve a term of two years in the state penitentiary, from which sentence and judgment this appeal is prosecuted.

The testimony of the state showed that the defendant got a merchant in Greenwood to cash this check. It was proven that no such man as T. A. Bowels had an account with the Bank of Commerce, and no such man was shown to have lived in the city of Greenwood. The testimony showed that the defendant was an ignorant negro and could neither read nor write. The testimony also showed that there was a party by the name of T. A. Bowles who lived in Greenwood, who was a doctor, and that the defendant, at the time he got this check cashed, told the party who cashed it that it was Dr. Bowles' check.

After the introduction of all the state's testimony, the defendant made a motion to exclude same. Without setting forth in full the defendant's testimony, it is sufficient to say that, if the jury had believed it, he would have been acquitted. The indictment in the case alleged that the check uttered was a forged check, and that the defendant intended to injure and defraud certain per-

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ties, among others the Bank of Commerce and T. A. Bowels, and other persons to the grand jury unknown.

The indictment did not allege that this was an attempt to publish or utter a forged check purporting to be that of T. A. Bowles. The testimony, however, all tended to show this. The words "Bowles" and "Bowels" are not *idem sonans;* the first being a word of one syllable, the second a word of two syllables. The different positions of the letter "l" in the two words make two entirely different words. It was necessary for the indictment to have alleged the above extrinsic explanatory facts.

"Where extrinsic facts are necessary to be known and considered, along with the writing, in order to constitute forgery, an indictment therefor must be set out such facts, as well as the instrument itself." *Griffin* v. *State,* 96 Miss. 309, 51 So. 466; *France* v. *State,* 83 Miss. 281, 35 So. 313; *Agee* v. *State,* 113 Ala. 52, 21 So. 207.

It therefore follows that there was a variance between the indictment and proof, and the motion to exclude the testimony of the state should have been sustained.

The court granted the state the following instruction:

"The court instructs the jury that in this case you do not have to believe that the defendant can read or write, or that he forged this check in question; it is only necessary that you believe from the evidence in this case beyond a reasonable doubt that he uttered or passed or undertook to pass said check knowing the same to be forged or counterfeit, and if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Gibb May, did pass or utter or undertake to utter said check knowing it to be false, then you will find him guilty as charged."

The indictment was drawn under section 1192, Code of 1906. One of the necessary ingredients of the crime therein charged is that the same shall be uttered "with intent to defraud." The above charge omitted these words. In the statutory definition of murder, section

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1227, Code of 1906, among other things, the homicide must have been committed "without authority of law." This court has several times held that it was error to attempt to define murder under the statute and leave out the words "without authority of law." *Ivy* v. *State*, 84 Miss. 265, 36 So. 265; *Rutherford* v. *State*, 100 Miss. 832, 57 So. 224. The above instruction given for the state was erroneous, because omitting the necessary ingredient of the statutory definition, viz. "with intent to defraud."

Reversed and remanded.

WILLIAMSON ET AL v. STATE.

[76 South. 637, Division A.]

HOMICIDE. *Instructions. Right of accused to arm himself. Self-defense.* Where in a prosecution for murder, the jury could have found from the evidence, that defendant provoked the difficulty with the deceased by going into the house and attempting to shoot him, but failing so to do, abandoned the difficulty and fled and while attempting in good faith to escape, was pursued and attacked by deceased and forced to kill him in self-defense, in such case it was error for the court to instruct the jury for the state, that defendant could not arm himself with a deadly weapon with the intention of using it to overcome his adversary if necessary and go upon deceased's premises and provoke a difficulty with him, slay him and then claim self-defense.

APPEAL from the circuit court of Sunflower county.

HON. W. H. HUGHES, Judge.

Ode and Cooper Williamson were convicted of murder and appeal.

Appellants, Ode and Cooper Williamson, were indicted jointly with Mrs. Cola Nichols, for the murder of one Walter Nichols, the father-in-law of Mrs. Cola Nichols, who had separated from her husband, David Nichols,

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some months prior to the killing. A severance was obtained, and appellants were tried separately from Mrs. Nichols, and from a conviction of murder and life sentence in the penitentiary, they appeal. The record shows that the appellants went to the home of the deceased, where deceased was killed by Ode Williamson. There was a conflict in the evidence as to who provoked the difficulty. Among other instructions given at the request of the state was instruction No. 4, which is as follows:

"The court instructs the jury for the state, that the law in this case is, that a person cannot arm himself with a deadly weapon, with the intention of using it to overcome his adversary, if necessary, and so armed, go upon the premises of another and provoke a difficulty with him, and in such difficulty slay his adversary with such deadly weapon, and then be heard to say that he acted in self-defense."

Bee King, A. M. Edwards and *A. W. McRaney,* for appellants.

We especially call the attention of the court to instruction No. 4, which reads as follows: "The court instructs the jury for the state, that the law in this state is that a person cannot arm himself with a deadly weapon with the intention of using it to overcome his adversary, if necessary, and so armed, go upon the premises of another and provoke a difficulty with him and in such difficulty slay his adversary with such deadly weapon and then be heard to say that he acted in self-defense." This is virtually a peremptory instruction and takes from the defendant in the case the right of self-defense, and was highly prejudicial to the defendants and the law as announced in this instruction is not applicable in any measure to the facts in this case, because there is no evidence showing that defendants went upon the premises of the deceased for the purpose of provoking a

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difficulty, or that they provoked a difficulty after they reached said premises, but all the evidence in the case both for the state and for the defendants shows that defendants left the premises or attempted to leave said premises immediately after discovering the deceased was at home and that whatever their intentions might have been and whatever their purpose in the beginning might have been whether good or evil, that they abandoned their purpose upon meeting the deceased and fled. Certainly it cannot be the law that because they were upon the premises of deceased, they would be denied the right of self-defense after the abandonment of their purpose, however evil it might have been. This theory of the law is condemned by this court in the case of *Jones* v. *State,* 84 Miss. 196, in which the following language is used: "It is well settled that one may wrongfully provoke a difficulty and yet if afterwards at any moment during its progress, he in good faith abandons the conflict and is subsequently murderously assaulted by the deceased and is forced to slay in self-defense, he is not estopped from pleading self-defense in justification of his acts. *Smith* v. *State,* 75 Miss. 553, 23 So. 260; *Patterson* v. *State,* 75 Miss. 675, 23 So. 647. We approve the language employed in *Lofton* v. *State,* 79 Miss. 734, 31 So. 425, where, speaking of an instruction similar to the one here under review the court said: "This form of charge declaring the defendant estopped to plead self-defense, is an exceedingly unwise one to be given. We have repeatedly condemned it. It can never be proper save in a few very rare cases where the case is such on its facts that a charge can be given embracing not part of them, nor nearly all of them—essential to the estoppel. The old paths are the safe paths." *Prine* v. *State,* 73 Miss. 838; *Jones* v. *State,* 36 So. 243.

We most respectfully submit that this case should be reversed and remanded.

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Frank Robinson, assistant attorney-general for the state.

The only instruction given by the state about which there could be any argument as to its correctness is instruction No. 4, which is as follows: "The court instructs the jury for the state, that the law in this case is, that a person cannot arm himself with a deadly weapon, with the intention of using it to overcome his adversary, if necessary, and so armed, go upon the premises of another and provoke a difficulty with him, and in such difficulty slay his adversary with such deadly weapon, and then be heard to say that he acted in self-defense."

This instruction may be somewhat crudely drawn, but I think it is a good charge. The criticism of this instruction by counsel for appellants is, that it fails to give the defendants the right of self-defense if the defendants had in good faith abandoned the conflict which he had provoked. In the case at bar, the defense of appellants is self-defense and an absolute denial of a premeditated design, but on the contrary, the specific defense was made that the mission of the appellants was altogether peaceful. So the failure to include in the instruction, the principle of an abandonment of the original premeditated design is necessary because of the peculiar facts of this case, harmless error.

SMITH, C. J., delivered the opinion of the court.

The jury could have found from the evidence that Ode Williamson provoked the difficulty with the deceased by going into the house and attempting to shoot him, but, failing so to do, abandoned the difficulty and fled, and while attempting in good faith to escape, was pursued and attacked by deceased and forced to kill him in self-defense. Consequently the state's fourth instruction should not have been granted. *Smith* v. *State,* 75 Miss. 553, 23 So. 260; *Patterson* v. *State,* 75 Miss. 675, 23 So.

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647; *Lofton* v. *State*, 79 Miss. 734, 31 So. 420; *Jones* v. *State*, 84 Miss. 194, 36 So. 243; note to *State* v. *Gordon*, 109 Am. St. Rep. 808 *et seq.*; 13 R. C. L. 834.

Reversed and remanded.

LEON MICHAEL Co. *v.* O'CONNELL-MYERS Co.

[76 South. 637, Division B.]

COMPROMISE AND SETTLEMENT. *Question for jury. Construction.*

Where plaintiff sold goods on defendant's order and defendant refused to pay for same, and plaintiff sued but the attorneys for both parties reached an understanding resulting in a judgment of dismissal, and the parties afterwards disagreed as to the meaning of the settlement agreement and plaintiff brought a new action for the original amount, in such case it was a question for the jury as to what was the agreement and it was error to peremptorily instruct for the defendant, especially where defendant did not attempt to carry out the agreement for which it contended.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by the Leon Michael Company against the O'Connell-Myers Company. From a judgment on peremptory instructions for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Salter & Hathorn, for appellant.

Looking through this entire record, one is absolutely at a loss to determine upon what theory the court sustained defendant's motion to exclude plaintiff's evidence. And we submit that said action of the court is the only thing involved in this appeal. That there was a good and valid sale entered into by and between the parties hereto prior to the — day of November, 1914, the date of the dismissal

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of the former suit, as shown by the record in this cause, cannot be gainsaid. To say the very least, the record discloses, *prima facie,* the fact of the sale, delivery, and receipt of the goods and the non-payment of the purchase price. The records certainly discloses a good and binding contract, and one which remained in force until discharged by some method or means recognized by law. Defendant; in the first portion of its motion takes the position that while there was originally a contract of sale, it was abrogated and set aside and for naught held by the agreement of the parties at the time of the dismissal of the suit, November 24, 1914, and in its very next breath, the concluding portion of said motion, it says as to the alleged contract or agreement "does not show that there was any meeting of minds of the parties at all." We wish here to impress upon the court the fact that appellant, in this case prior to the institution of the second suit, took the position that the supposed agreement attempted to be entered into when the first suit was dismissed in the circuit court, was unenforceable because of the lack of mutuality or failure of the minds of the interested parties to meet upon the terms of the agreement and that the original contract remained in force, and that it thereupon brought this suit upon the original contract or sale and that it took all its testimony and offered all its evidence on the trial upon this theory of the case. Appellee said in its motion that "you cannot maintain this suit upon the original contract because we made a new contract with you with reference to these very goods on November —, 1914, and that said agreement or contract extinguished your rights under it" and then it says further, "you can't maintain any action on the agreement which vacated and set aside the original contract because the former was not any contract or agreement in contemplation of law." And strange as it may appear, that is exactly what the court said in sustaining appellee's motion. The court virtually said to the appellant: "Yes, the O'Connell-Myers Company bought your goods to the amount of one hundred and eighty-nine dollars and thirty-seven cents and have

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paid you only sixty-seven dollars and four cents on the purchase price, but you can't collect the balanee in this suit because on November 24, 1914, you made another trade with appellee with reference to these identical goods, but you needn't go out and bring another action on that second contract and thereby seek to collect an honest debt of one hundred and thirty-three dollars and thirty-three cents, because that second contract, while sufficient to enable defendant to escape payment on the first contract, is not sufficient to give you standing in a court of justice when you try to enforce your rights thereunder." We submit that an examination of this entire record will reveal just such state of facts.

It cannot be seriously asserted nor contended that the agreement, so called, entered into by the parties on the 24th day of November, 1914, was such as to abrogate or set aside the original contract and sale. An examintion of the record shows that while the appellant understood the agreement to have been one thing, the appellee understood that the agreement was altogether different. There can be no question upon this point, and appellee does not contend that the original contract was ineffective by virtue of the new agreement, for it says in its motion as to said agreement, "does not show that there was any meeting of the minds at all." Then may we ask what annulled, vacated, or set aside the contract upon which appellant founded its present suit.

We feel that the error is so patent, glaring and flagrant as to need no citation of authorities to warrant a reversal of the cause. The principle is elementary and citation of authority is superflous, but; "To render an agreement effective as a discharge of a contract, it must have all the elements of a valid contract including consideration." 3 Elliott on Contracts, 1857. "The new agreement to discharge an existing valid contract must have all the requisites of a valid and enforceable agreement or it will not be binding." 9 Cyc. 593. "A proposition for mutual rescission of a contract assumes its validity, and the proposition being rejected, the parties stand where they did be-

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fore." 9 Cyc. 593. "If the new contract is invalid and unenforceable, it does not abrogate or modify the old contract." 3 Elliott on Contracts, page 9. "The same is true of a contract invalid for want of a consideration, or where there is not the necessary mutuality." 3 Elliott on Contracts, paragraph 1863.

We submit that appellee's position and contention was that we could not maintain our suit upon the original contract because of the substitution therefor of another contract or agreement which is repudiated, in the same breath, as no contract at all, and that the court sustained defendant's motion and dismissed appellant's cause of action upon appellee's theory of the law. We confidently assert that the court's action is without warrant or authority of law. The decisions are uniform and against appellee. We challenge learned counsel for appellee for the citation of a single authority, even remotely tending to sustain its position or the action of the court in sustaining said motion. We earnestly and confidently assert that the cause ought, must, and will be reversed *"per curiam."*

J. T. Garriway, for appellee.

The statement of the case by the appellant leading up to and including the first transaction is substantially correct, and the only thing we desire to do is to invite the court's attention to a careful reading of the evidence upon which the appellant sought to obtain a judgment in the lower court, which reveals the fact that the former suit had been adjudicated and put up to an end, and that this suit arose out of a verbal agreement that the appellant is here trying to recover, and the record is clear that there never was the meeting of the minds of the litigants, that would warrant the appellant in suing on a breach of verbal contract, as they are trying in this case; this being true there is not the slightest evidence to let this case go to the jury, and there was nothing else for the lower

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court to have done other than what it did in sustaining the motion.

When the former controversy in the circuit court was settled that put an end to that suit, and was *res adjudicata* as to all matters that could have and should have been adjusted, and which were passed upon, and the appellant seems to realize this fact, and they dropped the matter and came back and started their case in the justice court on a breach of a verbal contract, and the burden was on them to establish this fact, and this we submit, they utterly failed.

We submit, that the only question for the consideration of this court is whether or not there was a contract established by the appellant, that would warrant a recovery, for we take it for granted that if they ever recovered, they must do so on the strength of establishing evidence to show such a contract and this we submit has not been done, and without further argument, we submit that this case will be affirmed *per curiam*.

ETHRIDGE, J., delivered the opinion of the court.

Leon Michael Company, through their agent, sold the O'Connell-Myers Company a bill of lace and embroidery, and on receipt of the order sent the O'Connell-Myers Company an acknowledgment of the receipt thereof, with a statement of the approximated amount of the order, which amounted, according to estimate, to one hundred and ninety-one dollars, but on invoice amounted to one hundred and eighty-nine dollars and thirty-seven cents. Afterwards the goods were shipped to O'Connell-Myers Company at Sumrall, Miss., who took the goods and found that there was quite a large quantity of the lace, and wrote the Leon Michael Company that there was more lace than they anticipated and more than they could handle within a reasonable time, and that they would not accept the goods. To this notice the Leon Michael Company replied that they had looked up the original order and found that every item was shipped as ordered, and

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that they would not cancel the order. The O'Connell-Myers Company refused to pay, and shipped the portion of the goods back to the Leon Michael Company, who declined to receive such shipment and who brought suit upon the original order. This suit was appealed to the circuit court, and there an understanding was reached by the attorneys of Leon Michael Company and a member of the O'Connell-Myers Company, and a judgment of dismissal, equivalent to a nonsuit, was taken.

The attorneys for the appellant notified the appellant of the settlement, and that by the terms of the settlement the appellee was to pay sixty-seven dollars on account, and was to be allowed until the following May to dispose of the remainder. The goods were thereupon returned to O'Connell-Myers Company, who wrote the Michael Company that their understanding was they were to have until May to settle for the goods, and that all goods remaining unsold at that time would be returned at invoice price. Michael Company refused to accede to this arrangement, and O'Connell-Myers Company refused to receive the goods, but returned them, and the Leon Michael Company refused to receive them, and after the date in May passed instituted this suit.

A member of the O'Connell-Myers Company, as a defense to this suit, made affidavit that said O'Connell-Myers Company is in no manner or form liable to plaintiff for said amount, or any part thereof. This case also reached the circuit court, the suit being on the original invoice price, less the credit of sixty-seven dollars, and upon the hearing the foregoing facts appeared in evidence, the appellant alone introducing evidence in said trial, and said facts appearing in its testimony. Thereupon, on motion of appellee, the circuit judge granted a peremptory instruction to find for the appellee. We are advised that this ruling was made on the theory that the original contract was superseded by a new agreement, and that there was, in legal effect, no new agreement, because the minds of the parties did not meet in the second contract. We think the learned court below was in error.

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There was a dispute as to what the new agreement was, but there is no dispute that the parties did not agree on one theory or the other, and it was a question for the jury to decide which contention was the real agreement. In any view of the case, the appellee did not undertake to carry out the agreement, according to their contention, and we think the peremptory instruction was error.

Reversed and remanded.

CLARK v. CLARK ET AL.

[76 South. 638, Division B.]

1. MARRIAGE. *Capacity to marry. Prior marriage.*
A man already married and not divorced cannot marry another and a purported marriage between them was void, even without divorce.

2. SAME.
In such case the second wife could legally marry another without obtaining a divorce from such pretended husband.

APPEAL from the chancery court of Kemper county.
HON. A. Y. WOODWARD, Chancellor.

Bill by Albert Clark and others against Mandy Clark. From a judgment for complainants, defendant appeals.

The facts are fully stated in the opinion of the court.

G. J. Rencher and *Geo. Butler,* for appellant.

J. H. Daws and *W. C. Well,* for appellee.

ETHRIDGE, J., delivered the opinion of the court.

Albert Clark and others filed a bill in the chancery court of Kemper county against Mandy Clark, alleging that Nero Clark, deceased, departed this life intestate seised

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and possessed of certain property in Kemper county, and that the complainants were brothers and sisters and descendants of brothers and sister of Nero Clark, deceased. They allege that the defendant, Mandy Clark, is claiming an interest in the said lands by virtue of the pretended marriage to the deceased, Nero Clark, and aver that such pretended marriage was void because the defendant, Mandy Clark, at the time of the ceremonial marriage with Nero Clark was lawfully married to Daniel Savior by virtue of a valid and ceremonial marriage, and prayed for an order of court canceling the claim of Mandy Clark as to the land and for an order of sale of the land for division among the complainants.

The defendant, Mandy Clark, denied that the complainants were the only heirs of Nero Clark, but admitted the kinship set out in the bill of complaint, admits that Nero Clark was the owner of the land described, but denied that the complainants were his heirs in the sense of inheriting the property, and avers that she is the sole heir of the said Nero Clark. She denies that she was ever lawfully married to Daniel Savior, but asserts that she was lawfully married to Nero Clark. The bill was not sworn to, and did not waive answer under oath, and the answer was sworn to. Subsequent to the filing of the answer the defendant filed an amended answer and cross-bill. In this amended pleading she charges that at the time she and Daniel Savior undertook to marry the said Daniel Savior had a living wife from whom he had not been divorced, and that this was not known to the defendant, and that as soon as she found out she was not legally married, she quit the said Daniel Savior.

The complainant proved by witnesses the ceremonial marriage between Daniel Savior and Mandy Burrage, now Mandy Clark, who is the defendant and appellant in this cause. The defendant proved by a nephew of Daniel Savior that Daniel Savior was married in Leake county to a woman named Martha, and that he and Martha were recognized as husband and wife in the community in which they lived, and by the friends and relatives of Dan-

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iel Savior; that such marriage between Daniel Savior and Martha occurred some time after the surrender, or close of the late Civil War, and that some time thereafter Daniel Savior got into some trouble with the white people in his community and left the county. The witness, who was a nephew of Daniel Savior, also left the county with his family and moved into Winston county. He testifies that his uncle, Daniel Savior, visited him subsequent to such date and subsequent to the date which it was charged he was married to Mandy, the appellant, and that at the time of such visit his Aunt Martha, wife of Daniel, was still living. The children of Daniel Savior and the appellant, Mandy, testified that, many years after the marriage ceremony was performed between Daniel Savior and Mandy, a nephew of Daniel Savior came to Kemper county, and that Daniel Savior and nephew went to Newton or Scott county and visited the former wife of Daniel Savior, staying over there some several weeks, and returned home and informed Mandy that he was going to live with his "real wife," Martha, and was going to carry the children with him. This caused a riot in Israel, resulting in the appellant ceasing to live with Daniel Savior. These children also testify that afterwards Daniel Savior learned that Martha was dead, and married a woman in Kemper county known as Emma McCoy or Emma McWilliams, and that he contracted the said marriage prior to the marriage of Mandy with Nero Clark, and Daniel Savior continued to live with the McCoy or McWilliams woman until his death, which occurred about the same time as the death of Nero Clark. Other witnesses for the defendant testified that Daniel Savior admitted to them subsequent to his marriage with Mandy, and after their separation, that he had a living wife in Newton county, and that it was known and reputed in the community in which Daniel lived that he had a living, undivorced wife. The appellees took the deposition of the circuit clerk of Leake county, who examined the marriage records of such county from 1850 to 1886, which dates

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covered the period in which it is alleged that Savior lived with and was married to the woman Martha, but the clerk knew nothing of the parties, and knew nothing of whether there was any marriage entered into between said parties which did not appear of record. The questions to the circuit clerk were propounded with reference to the marriage of Daniel Savior. The witness, who was a nephew of Daniel called himself Savial, and it does not appear which was the true or correct name, Savial or Savior. There is no proof in the record contradicting the testimony of Savial, but such testimony is rather strengthened by proof in the record that Daniel Savior died at the home of his son in Jackson, Miss., who seems to have been the son of the woman Martha, though this does not clearly appear.

We do not think it necessary to go into a consideration or discussion of the conflicting presumptions that would arise from these multitudinous marriages, but we think the proof shows without contradiction that Daniel Savior had a living wife at the time of the alleged marriage with Mandy, and that there was no divorce from such wife. It follows that he was not capacitated to enter into a marriage with Mandy, and that the alleged marriage between him and Mandy was void. This being true, it was not necessary for Mandy to procure a divorce from Daniel to make her marriage with Nero Clark valid, as she and Nero Clark were legally married and were recognized as husband and wife in the community where all the parties lived, for a period of about ten years.

We think her marriage with Nero Clark was valid on the proof in this record, and that the chancellor erred in decreeing the property to the complainants and in canceling the claim of appellant to the estate of Nero Clark. The judgment is therefore reversed, and the bill of complaint dismissed.

Reversed and dismissed.

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RAYBORN v. STATE.

[76 South. 639, Division A.]

1. CRIMINAL LAW. *Confessions. Corpus delicti. Arson.*
The *corpus delicti* must be proven by evidence *aliunde* the confessions of the accused.

2. ARSON. *Corpus delicti. Evidence. Sufficiency.*
The *corpus delicti* in a case of arson consist, not only in the proof of the burning of the house or other things burned, but of criminal agency in causing the burning.

APPEAL from the circuit court of Walthall county.

HON D M. MILLER, Judge.

Clarence Rayborn was convicted of unlawfully, wilfully and maliciously and feloniously setting fire to and burning a fence and appeals.

The facts are fully stated in the opinion of the court.

E. G. Williams, for appellant.

The *corpus delicti* was not proven. The rule as laid down in the *Pitts case,* 43 Miss. 472, is that the proof must show that the fence was burned and that it was burned through some criminal agency. This statement of the law was cited and approved in *Spears* v. *The State,* 92 Miss. 613, and has not been questioned since that time. There is no evidence in this record that will show anything about how the fire which had burned this fence, originated, and not a single circumstance to show that it was caused by any criminal agency, except the statements made by the defendant himself. Excluding these statements, as we will undertake to show hereinafter should have been done, it is perfectly clear that the *corpus delicti* was not proven. As being in point supporting this position we cite *Barron* v. *State,* 71 So. (Miss.) 374; *Daniels* v. *State,* 68 So. (Ala.) 499.

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Ross A. Collins, attorney-general, for the state.

The *corpus delicti* can be shown like any other fact by circumstantial evidence. In the case at bar, the burning of the fence is shown. It is further shown that appellant was not on good terms with Mr. Bacot, the owner of the fence, because he had expelled appellant from school a short time before. It was shown by witness Howell that while passing along the road he observed that the fire was burning in the "rough" just a few feet from the fence and that it had burned over a space only about thirty yards wide but that the string of fire was about three hundred yards in length—a circumstance which rebuts and destroys any presumption that the fire was accidental. Taking all the facts and circumstances in the case together, criminal agency was sufficiently shown, and the confession of the accused was properly admitted.

Counsel for appellant argues in his brief that the confession was inadmissible because the *corpus delicti* was not first proven. The admission of the confession in evidence was objected to solely on the ground that it was incompetent—an entirely different ground from that argued in his brief.

This court, in the case of *Mississippi Central Railroad Company* v. *Robinson,* 106 Miss. 896, said: "It is the rule that this court, upon the hearing of an appeal, will only regard such objections to the admission as was made in the trial. We are considering errors of the trial court. We must limit this consideration to the ruling on the point presented to the court. To do otherwise 'would be for this court to review, not the case actually tried in the lower court, but one which might have been tried' " citing with approval *Alexander* v. *Eastland,* 37 Miss. 554; *Moore* v. *Railroad Company,* 59 Miss. 243.

The testimony of every witness for the state, and there were eight or ten, shows beyond a doubt that the confession was made freely and voluntarily without threats, fear or promises. Not only did he make a confession to the county attorney but to others at the justice of the peace

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court and plead guilty to the charge there in open court. The appellant admitting making the confessions, but claimed that he did so because of the promises made him by the county prosecuting attorney to let him off with the payment of a light fine. The credibility of these witnesses was for the jury to pass upon and they accepted the state's theory and rejected the defendant's.

SYKES, J., delivered the opinion of the court.

The appellant, Clarence Rayborn, was indicted and convicted in the circuit court of Walthall county of the crime of unlawfully, willfully, maliciously, and feloniously setting fire to and burning a certain fence. The indictment was based upon section 1042 of the Code of 1906. He was sentenced to a term of six months on the county farm and to pay a fine of $100.00, from which sentence and judgment this appeal is prosecuted.

An affidavit was originally made against this appellant before a justice of the peace, to which, in the justice of the peace court, he pleaded guilty and was sentenced, but prosecuted an appeal from the sentence and judgment of the justice of the peace court. In the circuit court he was at first put upon trial under this affidavit, but after the introduction of the testimony, the court sustained a demurrer to the evidence. The grand jury then indicted the defendant, and under this indictment he was convicted. From which judgment the present appeal was prosecuted. The fact that the fence was burned is testified to by several witnesses who passed the place while the fence was burning. These witnesses say that the fire started in what they term "the rough" near the fence. The fence and the rough were both burning for a distance of a number of yards when seen by the witnesses.

There were two confessions of the appellant introduced by the state. One of these was made to the county attorney in the presence of the constable and another witness after the appellant had been arrested. The other was his plea of guilty before the justice of the peace.

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There are two points made by counsel for appellant as cause for reversal. The first is that the *corpus delicti* was not proven *aliunde* the two confessions. The second is that the confessions were inadmissable because not freely and voluntarily made.

It is only necessary for us to consider the first question, viz., whether or not the *corpus delicti* was sufficiently proven without considering the two alleged confessions. This court has repeatedly held that the *corpus delicti* must be proven by evidence *aliunde* the confessions of the accused. *Stanley* v. *State,* 82 Miss. 498, 34 So. 360; *Jenkins* v. *State,* 41 Miss. 582; *Jenkins* v. *State,* 98 Miss. 717, 54 So. 158. In the latter case, in speaking of a plea of guilty entered before a justice of the peace, the court had this to say about it: "The plea of guilty entered by the appellant in the trial before the justice of the peace was entitled to no more weight in establishing the *corpus delicti* than the extrajudicial confession testified to by the witness Walker."

The mere fact that the fence was burned does not establish the *corpus delicti.* The criminal agency must be proven either by direct or circumstantial testimony. "The *corpus delicti,* in a case of arson consists, not only in the proof of the burning of the house or other thing burned, but of criminal agency in causing the burning." *Spears* v. *State,* 92 Miss. 619, 46 So. 166, 16 L. R. A. (N. S.) 285. This doctrine is reaffirmed in the late case of *Barron* v. *State,* 111 Miss. 231, 71 So. 374. In conclusion we say that there was no testimony whatever *aliunde* the confessions to establish that the fire was caused by any criminal agency, which is necessary before the defendant can be convicted in this case.

Reversed and remanded.

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MARDIS v. YAZOO & M. V. R. Co.

[76 South. 640, Division A.]

1. APPEAL AND ERROR. *Scope of review. Conflicting evidence.*
Where there is a distinct conflict in the evidence which might well have been resolved either way, the verdict of a jury will not be disturbed on appeal, unless the jury were improperly instructed as to the law of the case.

2. TRIAL. *Instructions. Preponderance of evidence.*
Where in a suit by a property owner for damages by fire alleged to have been caused by sparks from defendant's locomotives, the evidence would have warranted a finding for either party, it was error for the court to instruct the jury to find for the defendant, if the evidence left them in doubt and uncertain as to the cause of the fire, or whether the fire was caused by defendant's locomotive or some other person.

APPEAL from the circuit court of Jefferson county.

HON. R. E. JACKSON, Judge.

Suit by C. M. Mardis against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Ernest E. Brown, for appellant.

The lower court committed reversible error in giving instructions Nos. 1 and 3 for defendants. These instructions read as follows: "No. 1. The court instructs the jury that if the evidence leaves them in doubt and uncertain as to how the fire started, they should find for the defendant." "No. 3. The court instructs the jury for the defendant that if the evidence leaves them in doubt and uncertain as to whether the fire was caused by the locomotive of defendant or by some other accident or by some other setting fire to the store, they must find for defendant."

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We submit the above instructions imposed upon the plaintiff too great a burden, required him to remove all doubt from the minds of the jury as to the origin or cause of the fire that destroyed plaintiff's property, and constitute reversible error according to two well-considered and very recent decisions of this learned court, to wit: *Gentry* v. *Gulf & Ship Island R. Co.*, 109 Miss. 66, 67 So. 849, and *Stevenson* v. *Y. & M. V. R. R. Co.*, 112 Miss. 899, 74 So. 132.

In *Gentry* v. *Gulf & Ship Island R. R. Co.*, 109 Miss. 66, the following instruction was given: "The court instructs the jury for the defendant that if they are in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence in the case, the verdict of the jury should be 'we the jury find for the defendant.'"

Justice COOK in delivering the opinion of the court said: "This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all reasonable doubt. By this instruction the plaintiff must remove all doubt from the minds of the jury and that is not all; the plaintiff must remove all doubt, 'by a clear preponderance of the evidence.'" The plaintiff must establish his right to recovery by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury." In *Stevenson* v. *Y. & M. V. R. R. Co.*, 112 Miss. 899, the issue was whether the railroad locomotive or some other agency started the fire that damaged plaintiff, and the court instructed the jury "if you are in doubt about this proposition and cannot say of a certainty which was the cause of the damage, then it is your duty under the law to return a verdict for the defendant." Justice ETHRIDGE in delivering the opinion of the court very forcibly and properly said: "This instruction placed a greater degree of proof upon the plaintiff than the law requires, and constitutes reversible error. It

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is stronger than the instruction condemned in the case of *Gentry* v. *Gulf & Ship Island R. R. Co.*, 109 Miss. 66, 67 So. 849. The instruction in this case not only requires all doubts to be overcome by the plaintiff by a preponderance of the testimony, but by it the jury must say 'of a certainty' which kind of fire caused the damage. But for this erroneous instruction the case would have been affirmed, but the giving of it is reversible error, and the cause is therefore reversed and remanded."

Instructions Nos. 1 and 3 for defendant in the instant case required plaintiff to remove all doubt and uncertainty from minds of the jury that defendant's locomotive fired plaintiff's property and that no other agency could have caused the fire, or in other words the instructions placed upon plaintiff the burden of proving to a certainty that defendant's engine set out the fire, just as did the above instruction in *Stevenson* v. *Y. & M. V. R. R. Co.*, which Justice ETHRIDGE properly held constituted reversible error. We confidently contend that for the errors pointed out, this case should be reversed and remanded, so plaintiff's claim may be submitted to a jury of his peers upon legal and competent evidence and instructions and free of the irrelevant and incompetent testimony that aroused the prejudice naturally of the jury against defendant in the trial.

Mayes, Wells, May & Sanders, for appellee.

Since the issue as to the liability of the defendant for the result of the fire was submitted to and determined by the jury solely upon circumstantial evidence and upon conflicting testimony, this court should not disturb their verdict. It is well to consider all of the facts and circumstances in evidence. In the case of *Wood* v. *Gibbs*, 35 Miss. 559, this court speaking through HANDY, J., used the following language:

"As to the sufficiency of the evidence to sustain the verdict upon the material questions in controversy, the case is one showing conflicting testimony, and depending much

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upon the weight to be given to the statements of the respective witness, and upon inferences which might be drawn from the facts proved, and from the conduct of the parties. Such cases are peculiarly within the province of the jury, and verdicts should not be disturbed in them, but for clear and manifest error in the ruling of the court."

The finding of the jury for the defendant upon the question of liability for the fire, being a question of fact, and supported by sufficient evidence, should not be disturbed by the court. If a verdict is supported by evidence, and the court cannot say the jury was unwarranted in reaching its conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court. *Yazoo, etc., R. Co.* v. *Williams,* 67 Miss. 18; *K. C., etc., R. Co.* v. *Cantrell,* 70 Miss.. 329; *Moffett* v. *Robinson,* 2 Miss. Dec. 704; *Woodson et al.* v. *Owens,* 12 So. 207; *Terry* v. *State,* 12 So. 544; *Dickson* v. *Parker,* 3 H. (Miss.) 219; *Lea* v. *Guice,* 13 S. & M. (Miss.) 656; *Wane* v. *Kirkman,* 13 S. & M. (Miss.) 599; *Prewitt* v. *Coopwood,* 30 Miss. 369.

Where the evidence is entirely circumstantial, as it was in the case at bar, the verdict will not be set aside unless manifestly wrong. *Holton* v. *Adcock,* 27 Miss..758; *I. C. R. R. Co.* v. *Schultz,* 87 Miss. 321; *Watson* v. *Dickens,* 12 S. & M. (Miss.) 608; *Kelley* v. *Miller,* 39 Miss. 17.

In view of the purely circumstantial evidence submitted by the plaintiff in the court below to establish the origin of the fire, and to fix responsibility upon the defendant for its occurrance, and the conflicting testimony upon this vital point, we submit that the verdict of the jury on the facts in favor of the defendant should not be disturbed.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the judgment of the circuit court of Jefferson county, in which court the plaintiff below, appellant here, sued the defendant Railroad Com-

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pany for damages on account of causing his storehouse and contents to be destroyed by fire thrown from its locomotive No. 37 on January 21, 1915. There was a jury verdict, and judgment for the defendant railroad company in the lower court, from which judgment this appeal is prosecuted here.

Briefly stated, the facts shown in the lower court were as follows: Appellant, Mardis, plaintiff below, owned the storehouse at Stampley, Miss., which was situated near the right of way of defendant railroad company, about fifty feet from the track, and the store contained a stock of goods. In the early morning, January 21, 1915, between one and two o'clock, shortly after engine 37 had passed, it was discovered that this storehouse was on fire, it appearing that the fire started at the front end of the store, burning rapidly and totally destroying it. At the trial in the lower court the plaintiff introduced several witnesses, who testified that they lived near the railroad track and that they had, a few days before the fire occurred, noticed and observed that engine No. 37, the one which is supposed to have set out the fire, was frequently throwing fire and burning cinders, of large size, from its smokestack along the right of way as it passed on several occasions.. One witness for the plaintiff testified that he was at Stampley on the night of the fire, and that while he was standing close to the railroad crossing at Stampley near the store that was burned, about thirty minutes before the store was seen on fire, he noticed engine No. 37 pass through Stampley, throwing large sparks and lumps of fire as large as his finger from the smokestack, and that the wind was blowing strong from the direction of the engine toward the store building at the time the said engine No. 37 was passing by the store building, which was seen on fire about thirty minutes thereafter. The building and gallery were covered with galvanized iron, but was otherwise exposed to fire, as appears in the testimony.

The defendant railroad company introduced several witnesses who testified that the spark arrester, or netting,

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in the front of engine No. 37 was in good condition, and that large sparks could not be emitted from the engine through this netting. The engineer testified that his engine 37 on the night of the fire passed through Stampley and by the store about thirty minutes before it burned, and that his engine was not throwing sparks and burning cinders from the smokestack, but that the engine was in good condition and was not throwing sparks then nor at any time previous to that date; that he was working a "light throttle" through Stampley thirty minutes before the store was burned, and that sparks of any appreciable size cannot be thrown from an engine when working a light throttle as he was working on that occasion. The conductor corroborated in part the testimony of the engineer in so far as he could do so of his own knowledge.

With this sharp conflict in the testimony submitted to the jury by both sides, the jury returned a verdict in favor of the railroad company; and it is urged here by the appellant that the judgment of the lower court should be reversed for several reasons, but we will discuss only two of the grounds assigned:

First. The appellant contends that the verdict was contrary to the great weight of evidence in the case, and that the facts and circumstances of the fire shown by the plaintiff's testimony were so overwhelming and conclusive in favor of the plaintiff that the verdict of the jury is contrary to the evidence in the case. Counsel for appellant cite as authority for this proposition the case of *Richland Planting Co.* v. *Y. & M. V. R. R. Co.*, 113 Miss. 154, 74 So. 126. We cannot agree with the contention of counsel for appellant that the case cited is in point here, for the reason that the facts in the two cases are very much different. The testimony in the Richland Planting Case was wholly one-sided for the plaintiff, and was practically undisputed, and nearly amounted to conclusiveness, while in the case before us now the testimony seems to be fairly well divided and in sharp conflict, and the jury could have very well decided the issue of fact either way without being subjected to criticism; therefore we

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would not disturb the finding of fact of the jury in this case, if there was no other reversible error in it.

Second. The appellant contends that the judgment of the lower court should be reversed on account of the grant of two erroneous instructions to appellee, which are No. 1 and No. 3, and read as follows:

"No. 1. The court instructs the jury that if the evidence leaves them in doubt and uncertain as to how the fire started, they should find for the defendant."

"No. 3. The court instructs the jury for the defendant that if the evidence leaves them in doubt and uncertain as to whether the fire was caused by the locomotive of defendant or by some other accident or by some other setting fire to the store, they must find for defendant."

That these instructions are obviously erroneous there can be no doubt. There being a sharp conflict in the testimony, and it appearing that the testimony was such as easily to warrant the jury in finding that the store building was or was not set on fire by the locomotive, the instructions were damaging to appellant. These two erroneous instructions, telling the jury "that if the evidence leaves them in doubt and uncertain as to how the fire started they would find for the defendant," must have been prejudicial and harmful to the rights of the plaintiff below. This form of instruction has been repeatedly condemned as erroneous by this court in recent cases, and granting it in this case was manifest and reversible error. *Gentry* v. *Gulf & Ship Island R. R. Co.*, 109 Miss. 66, 67 So. 849; *Stevenson* v. *Yazoo & M. V. R. R. Co.*, 112 Miss. 899, 74 So. 132. We observe from the record that no other instructions were given by the court which in any way cured the error in instructions Nos. 1 and 3 given to and used by the railroad company in the trial below. For the error mentioned, the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded.

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NATIONS v. COLONIAL & UNITED STATES MORTGAGE CO., LIMITED.

[76 South. 642, Division B.]

WILLS. *Construction. Interest devised.*

Where a testatrix devised to her two daughters the balance of her estate, real and personal, and provided that in case of their death, the children of each should inherit their mother's shares respectively, and in the case of the death of one without children, then the whole of the estate to go to the other, and in case of the death of both without children, the estate to go to the brothers and sisters of testatrix, then living. The contingency provided against was the death of either one of the daughters during the lifetime of the testatrix, and in the event of the daughters' survival of the testatrix they took a fee simple, regardless of the provisions of Code 1906, sections 2764-2765-2776-2778.

APPEAL from the chancery court of Tallahatchie county.

HON. JOE MAY, Chancellor.

Bill by Bessie Maybelle Nations, a minor, by her next friend, against the Colonial & United States Mortgage Company, Limited and others. From a decree sustaining defendant's demurrer and dismissing the bill, complainants appeal.

Sections 2764, 2765, 2776, and 2778, Code of 1906, referred to in the opinion, are as follows:

Section 2764: "Words of Inheritance Not Necessary.—Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee simple if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby."

Section 2765: "Estates in Fee Tail Prohibited.—Estates in fee tail are prohibited; and every estate which,

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but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple."

Section 2776: "The Rule in Shelley's Case Abolished.—A conveyance or devise of land or other property to any person for life, with remainder to his heirs or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs or heirs of his body, who shall take as purchasers, by virtue of the remainder so limited to them."

Section 2778: "Limitation on Failure of Issue.—Every contingent limitation in any conveyance or will made to depend upon the dying of any person without heirs or heirs of the body, or without issue or issue of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted as a limitation, to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the instrument creating it."

H. H. Creekmore and *H. M. Baddley,* for appellant.

The devise in the fourth item of the will to Laura M. Powell, mother of appellant, is "without any words of inheritance." The words, "absolutely share and share alike," are not words of inheritance; they are not words of limitation; they do not define the extent of the estate devised; those words simply declare the absolute equality of the shares of the two devisees.

And it clearly appears from the face of this item of the will, that the testatrix intended to thereby devise to appellant's mother a "less estate" than a fee simple;

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the provisions in this item for the children of the two named devisees show clearly that the testatrix intended to devise to her two daughters a life estate only, and that she intended to embrace her grand-children in the objects of her bounty, and that could be done only by limiting the devise to her daughters to a life estate.

The word "children" used in this clause of the will is used by the testatrix as a word of "purchase" and not a word of "limitation;" and the word "inherit" in this item of the will in respect to the "children" of the two named devisees is not used by the testatrix as a word of "inheritance" but as a word of "purchase" and was used in the sense of to "go to or belong to."

It is absolutely clear from the fourth item of Mrs. Frank's will that she intended to and did thereby devise to Mrs. Nations a life estate only in the land, with remainder in fee to appellant, and the mortgage of defendants' is as to her absolutely null and void. Code 1906, secs. 2764, 2765, 2776, 2778; *Banking Co.* v. *Field,* 84 Miss. 646, 37 So. 139; *Busby* v. *Rhodes,* 58 Miss. 237; *Halsey* v. *Gee,* 79 Miss. 193; *Tate* v. *Townsend,* 61 Miss. 316.

J. S. Watson, for appellee.

The case is thus narrowed down to the single question: What interest did Laura M. take in "the whole estate" under clause 3? Our answer is that she took the fee. Opposing counsel insist that she took only a life estate with a contingent remainder in fee to any child or children she might leave surviving her.

Unless the fee devised by clause 1 to both of the daughters, and by clause 3 to the survivor of the two, the other dying without children, is reduced to a life estate by clause 2; the complainant is out of court and we shall now undertake to show that clause 2 has no such effect.

Our first proposition is that the words, "and in the case of their death," under firmly established rules for

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the construction of wills refer to the contingency of their death in the life time of the testatrix.

In support thereof, we cite the following authorities: 40 Cyc. App. 1499-1500; Ib. 1500-01; Ib., pp. 1505-06; 30 Am. & Eng. Ency. of Law, p. 785; Ib., p. 808; *Stone* v. *McEckron,* 57 Conn. 194, 17 Atl. 852; *Antioch College* v. *Bronson,* 145 Ind. 312, 44 N. E. 314; *Wright* v. *Charley,* 129 Ind. 257, 28 N. E. 706; *Moore* v. *Gary,* 149 Ind. 51, 48 N. E. 630; *Morgan* v. *Robins,* 159 Ind. 362, 53 N. N. 283; *Teal* v. *Richardson,* 160 Ind. 119, 66 N. E. 435; *Fowler* v. *Duhne,* 143 Ind. 248, 24 N. E. 623; *Collins* v. *Collins,* 116 Iowa, 703, 88 N. W. 1097; *Tarbell* v. *Smith,* 125 Iowa, 388, 101 N. W. 118; *Vanderzee* v. *Slingerland,* 103 N. Y. 47, 57 Am. Rep. 701; *In Re N. Y. L. & W. H. Co.,* 105 N. Y. 89; *Benson* v. *Corbin,* 145 N. Y. 359; *Mickey's Appeal,* 92 Pa. 514; *McAlpin's Estate,* 211 Pa. 26; *Myers* v. *Walker,* 214 Pa. 440; *Neubert* v. *Coldwell,* 219 Pa. 248; *Meacham* v. *Graham,* 98 Tenn. 569, 111 S. W. 1119; *Smith* v. *Smith,* 157 Ala. 79, 25 L. R. A. (N. S.), 1051; *Smith* v. *Smith,* 25 L. R. A. (N. S.), 1963; 3 Jarman on Wills, p. 605-9; *Katzenberger* v. *Weaver,* 110 Tenn. 620.

There is another well-recognized rule, if your honor please, which requires clause 3 of Mrs. Frank's will to be construed as referring to the death of the first taker during the lifetime of the testator. I quote from the very elaborate and extensive note already referred to. "A well-developed exception of the rule which considers a gift over effective upon the death of the first taker without children or issue whenever it may occur, exists where the gift in absolute terms is followed by limitations over, both in event of death leaving issue and in event of death without issue as to the first taker, meaning death either with or without issue. It is necessary in order to give due effect to the words of absolute gift to restrict the contingency to the period before the primary gift takes effect."

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The discussion of this rule, and authorities cited in its support begins on page 1100 and ends on page 1106 of 25 L. R. A. (N. S.) to which your honors are respectfully referred. 25 L. R. A. (N. S.) p. 1173.

Your honor will also observe that by clause 1 the testator devised her entire estate, both real and personal absolutely to her two daughters, share and share alike, and if the contention of opposing counsel is correct that the words in clause 2 "in case of their death, the children of each shall inherit their mother's shares respectively," and the language of clause 4 that "in case of the death of both without children, her estate should go to her brothers and sisters then living," meant death at any time either before or after the death of the testator, it would involve the absurdity of reducing the interest of the primary donees to a life estate even in the personalty which certainly no court would tolerate.

We respectfully submit that under clause 3 Laura M. took the entire estate, both real and personal, in fee, and that the decree of the lower court sustaining the demurrer and dismissing the bill was correct and should be affirmed.

COOK, P. J., delivered the opinion of the court.

We avail ourselves of the succinct statement of the case and the point to be determined upon this appeal appearing in appellee's brief, viz.:

"This is an appeal from a decree of the chancery court of Tallahatchie county, Miss., for the Second judicial district, sustaining the demurrer of the defendants and dismissing the complainant's bill.

"Appellant alleges in her bill that on the 24th day of October, 1904, her grandmother, the late Mrs. Mattie E. Frank, was the owner in fee of certain lands mentioned in the bill; that on that date she made and published a last will and testament; that she died at her home in Yallobusha county, Miss., on the —— day of March,

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1908; that said will was thereupon admitted to probate by the chancery court of Tallahatchie county, Miss.; and that thereafter, to wit, on December 11, 1911, a duly authenticated copy of said will was recorded in the record of wills for the Second judicial district of Tallahatchie county (in which county the said lands lie).

"The bill further alleges: 'That by the terms of said last will and testament Mrs. Mattie E. Frank devised and bequeathed to her daughters, Miss Laura M. Powell and Miss Mary Adelle Powell, all of her real estate, including the lands hereinabove described, share and share alike, with the provision that in case of their death the children of each, the said Laura M. Powell and Mary Adelle Powell, should inherit their respective shares, and, in case of the death of one of them without children, then the whole of the estate devised should go to the other.'

"The bill further alleges that the said Mary A. Powell died before her mother, the testatrix, and that she died childless; that the said Laura M. Powell survived her mother, and, subsequent to her mother's death, married Wilson B. Nations; that on the 25th day of March, 1915, the said Laura M. Nations and her husband, Wilson B. Nations, executed and delivered a deed conveying said lands to Harrison Holt, as trustee, one of the defendants, for the benefit of the Colonial & United States Mortgage Company, Limited, the other defendant, to secure the payment of an alleged debt of three thousand five hundred dollars, principal, and ten interest notes of two hundred and sixteen dollars each, which said deed of trust is of record in the office of the chancery clerk of the Second district of Tallahatchie county, Miss., in Book 7, p. 418; that shortly thereafter, to wit, on the 22d day of April, 1915, the said Laura M. Nations (née Powell) died, leaving only one child, the complainant; and complainant's claim is that her mother, the said Laura M. Nations, the sole legatee and devisee under the will of the said Mattie E. Frank (the said Mary

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Adelle Powell having predeceased the testatrix), took only a life estate in the property devised, and that at her mother's death title in fee passed to complainant, her only child.

"The prayer of the bill was that a decree might be entered canceling and holding for naught the said deed of trust described in the bill as a cloud upon the title of complainant to the lands covered by said trust deed, and for a writ of injunction enjoining the defendants, and each of them, their assigns, successors, agent, and attorneys, from attempting to assert any claim under the said deed of trust, and for general relief.

"On the other hand, defendants based their demurrer upon the proposition that the said Mary Adelle Powell having died without children during the lifetime of the testatrix, her codevisee, the said Laura M. Powell, under the provisions of said will, took the whole estatte in said lands in fee—from which the court will see that the only question in the case is the proper construction of the will of Mrs. Mattie E. Frank.

"As shown by the will, a copy of which is filed with the bill as 'Exhibit A,' the exact language of paragraph 4, as to the construction of which opposing counsel so radically differ, is as follows: '(4) I will and bequeath to my daughter, Miss Laura M. Powell and Miss Mary Adelle Powell, the balance of my estate, real and personal of every kind and description, absolutely share and share alike, and in the case of their death, then the children of each of the said Laura M. Powell and Mary Adelle Powell shall inherit their shares respectively, and in case of the death of one without children, then the whole of my estate shall go to the other, and in case of the death of both without children then my estate shall go to my brothers and sisters then living.'"

Appellant seems to assume that our statutes control the construction of this will, and that, because of our statutes, sections 2764, 2765, 2776, and 2778, Code of 1906, the chancellor misinterpreted the will.

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We are of opinion that the chancellor did not err, and that the sections of the Code referred to are not inconsistent with the construction adopted by him.

This court, in *Sims* v. *Conger,* 39 Miss. 310, 77 Am. Dec. 671, said:

"The rule is well settled, by numerous cases, that in a bequest to A., and 'in case he dies,' or 'in the event of his death,' simply, without further words of contingency, over to B., the contingency intended is the death of A. before the testator; and hence, if A. survived the testator, that he takes absolutely. The reason of this rule is that death, being a certain and inevitable event at some time, cannot be supposed to be the contingency really intended by the testator, and therefore that construction must be resorted to to ascertain the contingency contemplated; and as no reasonable contingency can be suggested to the mind from the words used, but that of the legatee dying before the testator, that is adopted as the contingency intended in such cases. *Hinkley* v. *Simmons,* 4 Ves. Jr. 160; *King* v. *Taylor,* 5 Ves. Jr. 806; *Cambridge* v. *Rouse,* 8 Ves. Jr. 12; *Webster* v. *Hale,* 8 Ves. Jr. 410; *Ommaney* v. *Beavan,* 18 Ves. Jr. 291; *Wright* v. *Stephens,* 4 Barr. & Ald. 674. These are cases where the terms of contingency are simply the death of the first taker and a limitation over in that event.

"In some cases, the death of the first taker has been held to mean his death at any time, notwithstanding the terms of limitation were simply 'upon his death.' But this has been by reason of other expressions or dispositions in the will, indicating that such was the intention or justifying such interpretation."

For other authorities, see 40 Cyc. 1499 et seq.; 30 A. & E. Ency. of Law, 785.

Affirmed.

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JAKE STRICKLAND LUMBER CO. *v.* RHEINHART.

[76 South. 643, Division B.]

1. MECHANICS LIEN. *Liens of materialmen and laborers. Rights of assignee of contractor.*

Under Code 1906, section 3074, giving to sub-contractors materialmen and laborers, a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against sub-contractors, materialmen and laborers, serving notice after the assignment, though the assignee does not give the lien claimant notice of his assignment.

2. MECHANICS LIEN. *Materialmen. Rights of assignee of contractor. Partnership. Evidence. Admissibility.*

In a suit by a materialman to enforce his lien upon money paid into court by the owner as still due the principal contractor, where it was charged that the assignee of the principal contractor, was in fact in partnership with him it was error to exclude the evidence of partnership since if it was a partnership the purported assignee would be subordinated to all of the other claims for material and labor, though the notice of such other claimants were served after the assignment.

APPEAL from the circuit court of Coahoma county.

HON. W. A. ALCORN, Judge.

Suit by S. Rhinehart against C. A. Carroll and others and the Jake Strickland Lumber Company. From the judgment rendered, the Lumber Company appeals.

The facts are fully stated in the opinion of the court.

T. B. Watkins and *Robert Powell,* for appellant.

We maintain that the funds paid into court should have been awarded to appellant to the exclusion of all other parties. This statement is based on the reason that appellant's assignment being first in time, was, therefore, prior in right, and appellant as payee of the order after date September 11, 1914, drawn on the ar-

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chitects, to be paid out of the funds of the Carroll job when completed, was entitled to the full amount of the funds of the Carroll job paid into the hands of the clerk to the exclusion of appellees.

A person who contracts to erect a building for another has the right to assign the money due or to become due to him from the owner with or without his consent. *Augustine Spangler et al.* v. *Stiles-Tull Lumber Co.*, 94 Miss. 780. Reinhart, Ellis, Waters and Shelton Hardware Company, who were but various materialmen, the first two of whom alone served on October 30, 1914, and November 2, 1914, respectively, "'stop notices" under section 3074 of the Code, the notices so given being served more than a month subsequent to the execution and delivery by the contractor of the assignment to appellant.

The court below, by its final judgment, distributed the two hundred and ninety-seven dollars and sixty cents paid into court as follows: Reinhart and Ellis were paid in full, and the balance of said fund was distributed proportionately to appellant, Joe Waters, and J. R. Shelton Hardware Company. We say the court should have awarded all of the two hundred and ninety-seven dollars and sixty cents to appellant on the balance of five hundred dollars due appellant on its assignment.

To intelligently discuss this, the first question presented is: Was the order drawn by the contractor on the Architects in favor of appellant "to be paid out of Carroll job when complete" an assignment. We contend that it was. 5 Corpus. Juris., 910; 5 Corpus. Juris., pages 911 and 912; *Spengler* v. *Stiles*, 48 So. 966; *Moody* v. *Kyle*, 34 Miss. 506.

We maintain that this case forever sets at rest the doctrine for which we contend in this appeal. However, our court in a more recent decision has reiterated this doctrine and, by its approval of this language used in *Stevens* v. *Ogden*, 130 New York, 182, 29 Northeastern 229: "The order drawn by the contractor on the owner in favor of E. H. Ogden & Company for nine hundred

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and nine dollars and ninety-four cents, being by its terms payable out of a particular fund specified in the order, operated as an assignment *pro tanto* of that fund," again enunciates the rule for which we now contend. (See the language of Chief Justice WHITFIELD, in case of *Spengler* v. *Stiles,* 48 So. 966, from which case we will hereafter quote at length.

The authorities cited, we respectfully maintain, uphold our contention that the order was an assignment. For the court's convenience, we now list the authorities cited on the above proposition advanced by us. A person who contracts to erect a building for another has the right to assign the money due or to become due to him with or without the consent of the owner. *Spengler et al.* v. *Style-Tull Lbr. Co.,* 94 Miss. 780; 5 Corpus. Juris., 906, 901, 911; 912, 922, 923, 924, 925 and 926; *Moody* v. *Kyle,* 34 Miss. 506; *Stevens* v. *Ogden,* 130 N. Y. 182, 29 Northeastern, 229; and authorities therein cited.

Assuming that the court will share our opinion that the order in question was an assignment, we now ask: What was its legal effect? Many cases might be cited to answer this question, but it has been so positively answered by our own supreme court that we think a citation of authorities other than the cases of our own Mississippi court would prove both burdensome and useless and, therefore content ourselves with the Mississippi decisions. These decisions undoubtedly and unmistakably uphold this our contention: That the assignment in question, being prior in time to the service of the stop notices served by Reinhart and Ellis on the owner Carroll, gave to appellant the prior right to the two hundred and ninety-seven dollars and sixty cents paid into court by the owner to the exclusion of the materialmen, appellees here. The Mississippi cases so holding are: *Herrin* v. *Warren & Mobley,* 61 Miss. 509; *Peck-Hammond Co.* v. *Williams,* 77 Miss. 824, 27 So. 995; *Spengler* v. *Stiles,* 48 So. 966; *Herrin* v. *Warren & Mobley,* 61 Miss. 509.

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We therefore, respectfully ask that this court award to appellant the full amount of the fund of two hundred and ninety-seven dollars and sixty cents paid into the hands of the clerk in the court below.

R. L. Burns and *Dan Brewer,* for appellee.

Appellees respectfully submit that a careful examination of the record will disclose that exact justice was done by the entry of the trial court of the judgment below.

We are constrained to believe that appellant the Jake Strickland Lumber Company does not seriously consider its appeal, and we feel that when the court has carefully examined the record, the judgment below will be affirmed, as we submit most respectfully it should be.

ETHRIDGE, J., delivered the opinion of the court.

C. A. Carroll had a residence erected in Clarksdale, Miss., under a contract with one Ward for a fixed price. Ward secured material from various parties for use in erecting said building. Before the building was completed Ward executed an assignment to the Jake Strickland Lumber Company for one thousand dollars, to be paid out of the proceeds from Carroll for the building. This assignment was not brought to the attention of Carroll, nor accepted by Carroll, but was presented to the architect superintending the construction of the building, and the architect would only allow five hundred dollars of said assignment, stating that he did not know how much it would take to complete the building.

S. Rheinhart filed an account in the court of a justice of the peace for one hundred and twelve dollars and fifty cents for material furnished in the building, and made Carroll and wife, the Bank of Clarksdale, the Clarksdale Building & Loan Association, Jake Strickland Lumber Company, and H. L. Ward parties defendant. In this petition in the justice's court he alleged

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that the Jake Strickland Lumber Company and H. L. Ward contracted with Carroll and wife for said building, and that they had constructed the building as contracted, and that the material furnished by Rheinhart went into said building. A like suit was filed by W. R. Ellis for fifty-six dollars and six cents, and the same parties were made defendants as in the other suit. Carroll and wife filed their answer, stating that two hundred and ninety-seven dollars remained due and unpaid on said work and no more, and paid this amount into court. H. L. Ward, the contractor, filed an answer, admitting the indebtedness claimed by Rheinhart and Ellis, and also suggesting that J. R. Shelton Hardware Company, Joe Watters, and one Finch also had claims for materials furnished in said building, but in his answer he contended that the Jake Strickland Lumber Company, who filed a claim for seven hundred and sixty-five dollars, was not entitled to any claim against said building, and claimed that he, Ward, and the Jake Strickland Lumber Company were partners in said contract, and that said bid and contract were made for and in the interest of the Jake Strickland Lumber Company. The Jake Strickland Lumber Company filed an answer denying the partnership and claiming seven hundred and sixty-five dollars for material and the balance of five hundred dollars on a one thousand dollar order which he claims was given prior to any service of notice on the owner and before suit. Ellis gave notice to the contractor of his claim on the 2d day of November, 1914, and Rheinhart gave notice on the 30th day of October, 1914. The cause was tried in the justice's court and the justice gave judgment in favor of Rheinhart and Ellis as preferred claims, and judgments for the other claimants brought in by intervention, and denied the claim of the Jake Strickland Lumber Company. From these judgments the Jake Strickland Lumber Company appealed to the circuit court, and Ellis and Rheinhart also appealed. In the circuit court H. L. Ward was offered as a witness for the plaintiffs Rheinhart and Ellis, and

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was asked the question, "In what way did you deal with the Jake Strickland Lumber Company?" and answered, "As partner and manager." The question and answer were objected to, and the objection was sustained by the court. This witness was also asked for whose benefit the contract with Carroll was made. This question was also objected to, and the objection was sustained. Ward also testified that the materials furnished by the Strickland Lumber Company in the building were furnished prior to the dissolution of their partnership arrangement. This evidence was objected to by the Strickland Lumber Company, and the objection sustained.

The court instructed the jury for the plaintiff that if the jury believed from the evidence the Jake Strickland Lumber Company was paid for all the materials and labor furnished by it in the construction of the Carroll job, they would find against the Jake Strickland Lumber Company.

The Jake Strickland Lumber Company requested an instruction that if the jury believed from the evidence that the Jake Strickland Lumber Company furnished labor and materials in the erection of the Carroll residence in excess of the amount alleged to be due on the order for one thousand dollars given by Ward to the Strickland Lumber Company, they will find for the Jake Strickland Lumber Company in such amount as the evidence shows to be due the Jake Strickland Lumber Company for all labor or materials, or both, furnished in the erection of the Carroll residence, and that the form of the jury's verdict in such case would be:

"We, the jury, find that the Jake Strickland Lumber Company furnished labor and materials used in the erection of the Carroll residence in excess of the amount of five hundred dollars alleged to be due on the order for one thousand dollars given by Ward to the Jake Strickland Lumber Company to the amount of —— dollars" filling in the amount as the evidence may show that the Jake Strickland Lumber Company furnished in

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excess of five hundred dollars, which the court refused to give.

The appellant also requested an instruction to find for the Jake Strickland Lumber Company whatever amount, if any, they may believe is due and owing said company for any and all material furnished, if any, in excess of the amount in controversy evidenced by draft or order by Ward on the contractor, which was also refused by the court.

The court granted the appellant an instruction that if the jury believed the Jake Strickland Lumber Company was entitled to recover the alleged balance of five hundred dollars on the order in evidence then their verdict will be:

"We, the jury, find for the Jake Strickland Lumber Company in the amount of five hundred dollars" and if they further believe that this amount is for labor and material used in the Carroll residence, the form of their verdict will be:

"We, the jury, find for the Jake Strickland Lumber Company in the sum of five hundred dollars, and that said sum is for labor and material furnished and used in the Carroll residence."

The court further instructed for the appellant that the burden was on Ward to establish by a preponderance of the evidence that the payment of five hundred dollars made on the order for one thousand dollars given by Ward to the Jake Strickland Lumber Company was accepted by the Jake Strickland Lumber Company in full payment of the whole amount of said order, and that unless the said Ward met this burden, by a preponderance of the evidence, to the satisfaction of the jury, then they would find for the Jake Strickland Lumber Company, and if they further believed from the evidence that such amount is due the Jake Strickland Lumber Company for materials or labor used in the erection of the Carroll residence, then they will certify in their verdict that the said amount is due the Jake Strickland Lumber Com-

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pany for labor and materials furnished and used in the erection of the Carroll residence.

The jury returned a verdict as instructed as to Rheinhart and Ellis, and returned the following verdict for Strickland:

"We, the jury, find for the Jake Strickland Lumber Company the amount of five hundred dollars."

Upon these verdicts the court below entered judgment against Ward in favor of each of the said parties for the amount found by the jury, and then apportioned the moneys paid into court by Carroll by allowing Rheinhart and Ellis their claims in full and prorating the balance of the fund between the Jake Strickland Lumber Company and the other defendants below on the basis of their claims. From this judgment the Jake Strickland Lumber Company appeals here, and insists that it should have been given a judgment for the full amount paid into court, and that the claims of the other parties should be subordinated to its claim on the assignment given by Ward to the Jake Strickland Lumber Company for five hundred dollars, the funds paid into court being less than five hundred dollars.

We are of the opinion that, unless there was a partnership between the Jake Strickland Lumber Company and Ward on this contract, the judgment should have been for the appellant, under the holding of the cases of *Spengler* v. *Lumber Company,* 94 Miss. 780, 48 So. 966, 19 Ann. Cas. 426, and *Herrin* v. *Warren & Mobley,* 61 Miss. 509. We think the court committed error in excluding the evidence of a partnership between Ward and the appellant, and, if there was a partnership, that the Jake Strickland Lumber Company would be subordinated to all of the other claims for material and labor. The question of partnership should have been submitted to the jury, under proper instructions, and if there was a partnership with reference to this contract, the assignment of Ward to the Jake Strickland Lumber Company would not be good against the claims of the materialmen

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and laborers accruing in the construction of the building. For the errors indicated the judgment is reversed, and the cause remanded.

Reversed and remanded.

BROWNE v. SANDERS ET UX.

[76 South. 645, Division B.]

MORTGAGES. *Foreclosure sale. Surplus. Recovery.*

Where a bill was filed by a husband and wife charging that they executed a trust deed to secure a debt to defendant who on foreclosure, bid in the property for an amount greater than the debt, and that the sale was made subject to a prior deed of trust of an association and asking judgment for the surplus, and the defendant answered that he bid in the property under an arrangement by which he was to bid for them and take up the debt to the association, and there was evidence, that the trustee made the sale under the understanding as contended by the defendant and that a contract was signed by defendant and the husband pursuant to such arrangement and there was also evidence that the husband arranged with defendant to buy the property for him and that there was no such understanding until after the sale, and there was no evidence conveying knowledge of this arrangement to the wife except that the husband usually attended to the wife's business. In such case judgment for the wife for one-half of the surplus was erroneous, the chancellor either should have set aside the sale to defendant as being made under a mistake of fact or else should have held defendant to his bid and allowed both the husband and wife to recover the difference, and charged them with the rent between the time of sale and judgment and given defendant possession of the property by decree.

APPEAL from the chancery court of Holmes county.

HON. A. Y. WOODWARD, Chancellor.

Bill by J. L. Sanders and wife against J. H. Browne. From the decree rendered, defendant appeals.

The facts are fully stated in the opinion of the court.

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E. F. Noel and *J. D. Guyton*, for appellant.

Elmore & Ruff, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

J. L. and M. M. Sanders filed a bill in the chancery court of Holmes county against J. H. Browne, alleging that the said J. L. and M. M. Sanders were the owners of a lot and house in the town of Durant, Miss., and some pasture lands, about thirty-five acres, near said town in said county, and that the said J. L. and M. M. Sanders executed a deed of trust to secure a certain indebtedness to Browne, said deed of trust and note being an exhibit to the bill; that Browne foreclosed said deed of trust and bid in the same at one thousand five hundred and twenty dollars; that the indebtedness to Browne was about six hundred and thirty-one dollars, alleging that the said sale was made subject to a prior deed of trust to the Georgia State Savings Association, and this suit was brought for the difference in the bid and the amount of the deed of trust, six hundred and thirty-one dollars, and demanded judgment for eight hundred and ninety-four dollars.

Browne answered the bill and admits the deed of trust and sale and the amount of the bid, but contends that he bid the property in under an arrangement by which he was to bid the place in for Sanders and wife and take up the indebtedness to the Georgia State Savings Association, and give the appellees twelve months in which to redeem said amount, during which time they would have the possession of the property without any charge for rent, and denies that he is due J. L. and M. M. Sanders the difference between the bid and the six hundred and thirty-one dollars, as claimed.

It appears in evidence that, when Browne went to the trustee, one G. H. McMorrough, an attorney of Lex-

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ington, Miss., he stated to the trustees, McMorrough, that he was to bid the property in for Sanders and give Sanders twelve months in which to redeem the property, and McMorrough advertised and made the sale of the property under this understanding, and instead of demanding the amount bid at the time, marked the deed of trust so as to indicate that the amount of the bid was paid upon the indebtedness. Within a very short time, less than two hours, after the sale Browne went to Sanders and told him he was ready to fix up the papers so as to give him the time agreed upon, and they went to a notary public in the town of Durant and drew a contract by which Sanders was to have twelve months in which to redeem the indebtedness, and to occupy the property in the meantime rent free. This contract was signed by Browne and J. L. Sanders, but was not presented to and signed by M. M. Sanders, who was the wife of J. L. Sanders; and she testifies she had no knowledge of any arrangement as testified to and contended for by Browne. On the same day of the sale, and after the execution of this contract between J. L. Sanders and Browne, J. L. and M. M. Sanders retained an attorney to bring suit for the purchase money above the indebtedness due on the deed of trust from them to Browne. There is testimony in the record sufficient to warrant the belief that Sanders arranged with Browne to buy in the property for him, and that he desired to retain it as a home, and to have twelve months in which to raise the money with which to pay off the indebtedness. There is also evidence in the record that would warrant the belief that there was no such understanding on the part of J. L. Sanders and Browne until after the sale. There is no evidence in the record, except the fact that Mrs. Sanders testifies that her husband usually attended to the business for herself and himself, that would convey knowledge to Mrs. Sanders of the arrangement between Browne and J. L. Sanders. In this state of the case the chancellor held that the con-

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tract between Browne and Sanders was binding on J. L. Sanders, and that he was estopped to sue for any part of the purchase money. But the chancellor held as to M. M. Sanders that she was entitled to one-half the purchase money above the indebtedness due Browne, and he entered judgment accordingly for Mrs. Sanders, but denied recovery as to J. L. Sanders.

It appears to us that the chancellor either should have set aside the sale to J. H. Browne, as being made under a mistake of fact, or else should have held Browne to his bid and allowed both J. L. and M. M. Sanders to recover the difference, and charged them with the rent between the time of sale and judgment, and given Browne possession of the property by decree. We do not see how the judgment as rendered by the chancellor can be upheld; because there was either an understanding to the effect contended for by Browne, or there was no such understanding, and if the sale was made on the understanding as testified to by Browne and his witnesses when in fact Mrs. Sanders was not a party to it, then Browne should not be held to a bid made under a mistaken belief that he was bidding in for Sanders at the request of Sanders and his wife. The judgment, therefore, will be reversed and the cause remanded for a proper decree.

Reversed and remanded.

HALL v. MERIDIAN LIGHT & RY. CO.

[76 South. 653, In Banc.]

EMINENT DOMAIN. *Injuries to abutting property. Doubling street car track. Declaration.*

The declaration by property-owners for damages caused by doubling a street car track, which is set out herein was held by the court to state a good cause of action.

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APPEAL from the circuit court of Lauderdale county.
HON. J. L. BUCKLY, Judge.

Suit by G. J. Hall and wife against the Meridian Light & Railway Company. On the death of one of the plaintiffs, his executor, W. M. Hall, was substituted. From a judgment sustaining a demurrer to the declaration, plaintiff appeals.

This is an appeal from a judgment of the lower court sustaining a demurrer to the declaration filed by the appellant, which is as follows:

Declaration.

Plaintiff G. Q. Hall, joined by his wife, Mrs. Kate Hall, complains of the Meridian Light & Railway Company, a corporation under the laws of the state of Mississippi, for this, to wit:

That whereas, heretofore, on to wit, the 19th day of October, 1910, and many years theretofore, and since and still is the owner of the lots 6, 7 and the west half of 8, block 22, Ball's survey of the city of Meridian, county of Lauderdale, and state of Mississippi, fronting south on Eighth street a distance of one hundred and fifty feet, or thereabouts, and running back between parallel lines along Thirtieth avenue to the center line of said block. That on said premises is situated the home of himself and family, together with a barn, outhouses, and other improvements. That the said Eighth street is a popular and populous residence street extending from the courthouse in the business district, on Twenty-First avenue, west to Fortieth avenue, a distance of one and one-fourth mile, or thereabouts. Parallel with said Eighth street, and one block to the south thereof, is Seventh street, of practically the same length and dimensions. Parallel with Eighth street, and one block to the north thereof, is Ninth street. There follows in regular succession, numerical order, and parallel with Eighth street, the following streets, to wit, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth, all being of as great length as Eighth street, and of like width and parallel as afore-

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said. That the said Meridian Light & Railway Company owns and operates an electric street railway system on and along divers of the streets and avenues of the city of Meridian, and claims to own and control a monopoly of the streets, avenues, and public thoroughfares of said city. That prior to October 19, 1910, the defendant street car company owned and operated one line of track located centrally on said street. That for some months prior to said date, defendant corporation conceived the idea of appropriating said street to practically its own exclusive uses and purposes, regardless of the rights and wishes of the property owners thereon, and procured from the municipal authorities permission to do so, in so far as they could legally do, but no further. The owners of property abutting on said street possessed rights therein which were and are property and cannot be taken away without their consent, or upon due compensation in the way and manner prescribed by law.

Said defendant could not, either with or without the city's consent, appropriate or subject said street to its monopolous uses, so as to interfere with public travel thereon, and thereby create a private or public nuisance; neither could it take away or impair the rights of abutting owners without their consent or without making due compensation as provided in section 17 of the Constitution of the state of Mississippi prohibiting the taking or damaging of private property for public use as except upon due compensation first made. So the said corporation set about to procure the consent of the property owners to its monopoly of said street, making divers and sundry promises of future benefits and concessions, and falsely promised to relieve them from the expense of street paving and the like, whereby some of the said property owners were misled into consenting to the commission of the proposed outrage upon their rights, based upon promises fraudulent in their nature and which were never intended to be performed, and which in point of fact were never fulfilled or performed. And some of the said property owners were thus falsely

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and fraudulently misled into signing away their rights therein to the said street car company, but others of said property owners declined to do so. The property owners had already many years theretofore consented to the location, construction, and operation of one line centrally on and along said street whereof nine feet or thereabouts of said highway had become perpetually set apart and appropriated to the uses of said street car company.

Plaintiff shows that said street from Twenty-Sixth avenue west is thirty-six feet in width between curbs. The building of said track centrally therein covered an actual width of five feet and two inches, and the operation of its cars about two feet on each side or practically a space of nine feet, leaving an unobstructed driveway on either side of thirteen feet, or thereabouts, for the accommodation of public travel in the ordinary modes and for the accommodation of abutting property owners in the enjoyment of their respective properties, and homes located thereon. But they could not consent that said company should appropriate so large a part of said street as would be required for the accommodation of two lines of track, for the reason that it would be tantamount to the appropriation of the whole street for street car purposes, leaving insufficient space between said track and curbs for travel in the ordinary way, and would too greatly burden the property owners' rights in said street, and would subject them to the many annoyances of dust, noise, and the dangers and inconveniences incident to an excess of street car use, misappropriation, and monopoly. They declined to assent to the double-tracking of said street, and in order to place the matter beyond peradventure, the following named persons, owning property on said street, to wit: F. W. Williams, Mrs. E. F. Stafford, G. Q. Hall, Beatrice Cohn, Mrs. A. S. Boseman, Mrs. R. P. Hall, Mrs. J. J. Maloney, Mrs. C. C. Williams, Mrs. Cliff Russell, Miss Leila Mae Smith, Mamie Henley Williams, Mrs. S. C. Stoutz, Green Thomas, Mrs. Jessie Bounds, Mrs. Weddington, Mrs. L.

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E. Evans, Mrs. D. E. Welch, A. G. Weems, G. A. Aden, L. P. Brown, F. C. Harvin, R. Y. Welch, Wm. Wright, J. W. Green, Mrs. C. Phillips, Mrs. A. N. Griffin, Mrs. Geo. A. Griffin, J. W. Stafford, Mrs. L. P. Whittaker, Mrs. W. W. Apperson, W. M. Stallworth, J. M. Stallworth, J. M. Harwell, Mrs. J. M. Harwell, Mrs. J. D. Harwell, Mrs. W. W. Cummings, Mrs. Matzner, Irvin Bounds, Mrs. Leta L. Bell, A. McMillan, W. W. Cummings, Edw. Funkenstein, R. H. Suttle, Misses Griffin, J. J. Maloney, A. McWright—in writing of date the—— day of June, 1910, gave notice to the municipal authorities and the street car company as follows, to wit: "We, the undersigned owners and lessees of property abutting on said Eighth street of the city of Meridian, hereby protest against the proposed double-tracking of said street, and we direct that a copy hereof be furnished the municipal authorities and the Meridian Light & Railway Company. We further request that the proposed paving of said street be proceeded with as speedily as practicable. This June 2, 1910." And a copy of the same was furnished A. B. Patterson, general manager of the street car company, in connection with another paper, reading as follows, to wit: "Dear Sir: We beg to herewith hand you a copy of paper protesting against the double-tracking of Eighth street, and expressing the wish of the signors for the speedy paving thereof."

They show that the money had been, for some time theretofore, provided for the paving of said street upon the usual terms, and the property owners were anxious that the same work of paving should be speedily done, for while other streets were being paved, Eighth street was maintained in an unpaved condition, and the money which had been provided for that purpose permitted to lie idle, though the property owners were paying interest on said funds. The reason for such a state of affairs was manifest, to wit, the municipal authorities deferred action for the accommodation of the said street without consulting the wishes of the abutting property owners,

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and which the said property owners so unrelentingly resisted.

Under the fundamental law private property cannot be taken or damaged for public use except upon due compensation first made. This provision of section 17 of the state Contitution afforded them the protection they desired, as well as the further fact that the said street was inadequate width to accommodate two street car lines, and travel in the ordinary way, at the same time. Neither could they consent to have their resident street bodily appropriated to the uses and the insatiate greed of this corporate monopoly, and especially were they opposed to having their residence street converted into a trunk line or commercial thoroughfare. Thus thwarted in its efforts to appropriate the said street and recognizing that any effort to do so by force would likely be met with like resistance, the said Meridian Light & Railway Company, its officers, agents, and attorneys, set about to procure maliciously and without probable cause an injunction order whereby under the semblance of legal authority the wishes and rights of the abutting property owners might be defeated and the said street thus wantonly, willfully, and maliciously taken and appropriated to its wrongful uses under the guise and protection of such writ of injunction.

With such purposes and object in view a bill in equity was prepared seeking to restrain the abutting property owners from interfering with the said street car company in its appropriation of said street, and in making such excavations as it might see proper therein, and the establishing its double tracks therein, and the state courts could not and would not afford it any relief or the protection of any injunction while engaged in the accomplishment of its illegal purpose; and while it recognized that the federal court was equally powerless in the premises, and possessed no jurisdiction of the controversy existing between said street car company in its desire to so appropriate said street and of the abutting property owners in their unalterable determination to resist the

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purpose of said street car company, still application was made to the United States circuit court for the Southern District of Mississippi for a writ of injunction for the accomplishment of said purpose. The said court being without jurisdiction, any order made would be a nullity, though the street car people recognized that plaintiff and the other property owners involved were good and law-abiding citizens, and would be obedient to the process of any court, state or federal, however wrongfully or improvidently granted, or however furnished or maliciously procured so long as the same might remain operative, and the said Meridian Light & Railway Company, through its regular attorneys, applied for and procured on the bill so prepared a federal injunction of date the 19th day of October, 1910, under a bill styled the *City Bank & Trust Company, Trustee,* v. *Mayor and Board of Councilmen and Aldermen of the City of Meridian et al.,* to which plaintiff herein and all the other abutting property owners on said street were made parties defendant.

The said injunction was procured maliciously and without probable cause; the controversy touching the double-tracking of said street was a controversy between the Meridian Light & Railway Company and the abutting property owners, which was a local controversy between the citizens of the state of Mississippi, whereof the federal courts had no jurisdiction—a fact well known to the street car company and its legal counsel. The use of the name of the City Bank & Trust Company as complainant in said suit was a fraud on the jurisdiction of said court, and was employed for the sole purpose of giving semblance of federal jurisdiction, in that the said City Bank & Trust Company was a non-resident of the state of Mississippi, and a resident of the state of Alabama, and its want of jurisdiction in the premises was thereafter so held by the federal appellate courts, as will be presently noted.

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Plaintiff shows that immediately upon the grant of said injunction *ex parte* and without affording him and the abutting property owners any opportunity to be heard, the Meridian Light & Railway Company at an early hour of the following morning, by force and arms under the protection of said writ and the United States martial, took possession of said street and proceeded forthwith to make excavations therein, tearing up and removing the old track therefrom, and changing the location from the center of said street to the south side thereof, and proceeded with all due haste to put in a second track on the northerly side of said street, and another track on the southerly side thereof, and from the date of the said taking possession thereof, and thence on until the 5th day of January, 1911, said work of double-tracking was pushed with extraordinary vigor until completed, and then, and not until then, was a hearing accorded them.

Plaintiff shows that the said court had no jurisdiction either of the subject-matter or the parties, and if the jurisdiction had existed, it is a federal court, was prohibited by the federal statutes, to grant an injunction in the absence of a hearing, with right of immediate appeal to the United States circuit court of appeals from any order that said circuit court might make after such hearing. He shows that the only exception to the said merciful, wholesome, and righteous rule of the federal statutes in that regard is that a temporary restraining order may be had in advance of a hearing where irreparable injury would otherwise result from any delay in hearing, but then only for the purpose of maintaining the *status quo* pending a hearing.

Defendant, the Meridian Light & Railway Company, well knew that the said court had no jurisdiction of said cause, predicated, as it was, upon diversity of citizenship, and that even if jurisdiction did exist, because of such diverse citizenship the said federal judge had no power to grant an injunction anticipatory

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of the result on final hearing, or to other than grant a temporary restraining order to maintain the *status quo* pending a hearing. So that, in taking possession of said street in the way and manner that it was done, and appropriating the same to its own use, and making excavations therein, and laying its cross-ties and rails and changing the location of the old track by several feet and building its double tracks therein, its acts were willful, malicious, deliberate, premeditated acts of trespass, without a semblance of authority, in defiance of the rights of the citizens and of plaintiff and other property owners involved. He shows that the general counsel and the local counsel of the Meridian Light & Railway Company prepared and signed the said bill and procured the said *fiat*, and directed the said unlawful proceedings and appeared as complainants' counsel in the United States circuit court and in the United States circuit court of appeals.

Your orators further show that not only did the Meridian Street Car Company commit a most flagrant and wanton outrage upon their rights, as aforesaid, but it went further and aggravated the wrongs so being perpetrated in that with several hundred noisy, irresponsible negroes, singing, yelling, and guffawing, it proceeded with said work by night and day twenty-four hours per day in utter indifference and disregard of consequences. The goverment's writ of injunction and the presence of the government's officers were sufficient to restrain violence, or prevent the exercise of the right of defense. In addition divers and sundry carloads of cross-ties and steel rails of unusual size, weight, and dimensions were being constantly both day and night hauled in carloads along said street and dumped from the cars, and then pounded with sledges and other hammers and appliances, whereby unearthly noises were produced akin to the deafening din, jar, and roar of a boiler factory. That sort of conduct, for the duration of more than two months and until the work of usur-

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pation and outrage was completed, was indulged in a civilized community, and was tolerated because no sort of redress was accorded them, though they were clamorous for a hearing, which the law itself guaranteed.

Promptly plaintiff and others similarily circumstanced procured counsel and prepared and filed their answer by the date named in said bill, to wit, November 7, 1910, accompanied by affidavit as to existing conditions, and at said date (being the date named in said writ of injunction for hearing, and at the time and place named, to wit, Monday, the 7th day of November, 1910, at the federal courtroom in the city of Jackson) they appeared by counsel with their said answer, and their motion resisting the grant of any injunction, and also seeking to dissolve the injunction already granted under the guise of a temporary order and announced ready and demanded a hearing. But defendant's counsel resisted a hearing, and a continuance was granted over their protests until Wednesday, the 19th day of November, 1910, at which time and place their counsel again appeared and demanded a hearing. But an indefinite postponement was then ordered over their protests till a date not named in December. Thus matters stood until January 5, 1911. On said date (January 5, 1911), at the city of Vicksburg, they were given a hearing, and both of their motions were overruled and denied, and an appeal was promptly then and there taken to the United States circuit court of appeals. And said court of appeals reversed the action of the lower court and remanded the cause, with instructions to dismiss for want of jurisdiction.

The opinion in said cause is reported under the style of *Williams et al.* v. *City Bank & Trust Co.*, 186 Fed. 419, 108 C. C. A. 341. Thereupon the said cause was taken to the United States supreme court on application to have same reviewed on *certiorari*, and a hearing was not had on the 11th day of December, 1911, and on the following Monday the said application was denied, and

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the said supreme court affirmed the action of the court of appeals, and issued its mandate duly to the said court of appeals, which thereupon put in force its former order to the United States circuit court to dismiss the said cause for want of jurisdiction. And pursuantly on the ——— day of December, 1911, a final decree was entered by the said United States circuit court for the Southern District of Mississippi at Meridian, finally disposing of said cause for want of jurisdiction, whereby said injunction was dissolved.

Plaintiff shows that Eighth street was, prior to November, 1910, cumbered only by a single track for a period of fifteen nor twenty years, by the permit of the abutting property owners, but the track so permitted to be laid, and whereon its cars were operated for that length of time, was in the center of said street, and adequate space left on either side for other travel. The width of said street between curbs from Twenty-Sixth avenue to Fortieth avenue, a distance of fourteen blocks, is thirty-six feet. The track as laid was five and one-sixth feet between rails, measured from the outer edge. The cars in passing extend twenty-two inches outside of the rails on either side, covering a total space of about nine feet. There is thus left a strip of thirteen and one-half feet on either side for travel by the ordinary means. Such are the conditions to which the public had voluntary assented, and which they had tolerated for fifteen or twenty years. In other words, the occupants and owners of property abutting on said street were willing to tolerate such a burden upon their rights upon the condition that ample space be left on either side to accommodate travel and to leave unobstructed ample means of access to and from their homes and property. But they were unalterably opposed to further obstruction or of interference with their rights in the premises, and especially were they unwilling to have their street bodily appropriated to the use of the insatiable greed of said street car company, attended by a manifest increase of inconvenience, dust, and danger.

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Defendant company, through its willful, unlawful, malicious, high-handed and oppressive methods aforesaid repudiated the permit theretofore granted to it by the abutting property owners to build, maintain, and operate its one line of track in the center of said street, and under the protection of its said unwarranted federal injunction, procured maliciously and without probable cause, seized the said street and excavated the same to the depth it saw proper on both sides of the central line and out to the curb, and then tore up and removed the lawful track theretofore centrally laid therein, and proceeded to permanently establish, construct, and put in operation two other tracks not authorized, the one on the south and the other on the north side of said street, with a space between the outer rails and the curbs of ten feet and seven inches, or deducting the space or distance covered by the extension of the cars beyond the track, of practically two feet on either side, leaving a travel way of only eight and one-half feet between passing cars and the curb on either side. Thus one of the most populous and popular residence streets in said city has been seized and wrongfully appropriated and confiscated to the uses of said street car company, and is measurably destroyed for all other purposes.

Said street has been rendered exceedingly noisy, dusty, and dangerous, and the cars in use thereon have been so greatly increased in size as to cause them to produce as much noise as an ordinary box car of unusual size on a steam railroad, and to render present living on said street nigh akin to what the conditions would be if the traffic thereon was operated by steam power. Carriages and wheel vehicles cannot pass each other at the same time that cars are passing, nor can those drawn by animals be hitched or left standing at the curb in front of the premises abutting on said street, nor can other vehicles pass them while so hitched or standing without incurring the dangers of getting onto the said car tracks and being destroyed, and de-

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fendant street car company has increased the number of cars operated thereon to double the number theretofore; that is to say, has abolished the fifteen minute schedule that formerly obtained, and there is reasonable probability of a further increase and frequency of passage of the cars to meet the growth of population and demands of traffic.

He shows that accidents have become quite numerous from collisions between cars passing vehicles, and the vehicles drawn by animals are abandoning said street, though once more frequented, and are not now disposed to use said street because of the increased risks, and that class of travel thereon is becoming less and less frequent, and said street will soon be given over to the sole use of street car company. But heavy delivery wagons, for coal, lumber, brick, provisions, and otherwise supplying the needs of the inhabitants thereon, are forced to run the existing risks of said double tracks on said street. Plaintiff shows that the said injunction was procured through fraud and malice and without probable cause from a court devoid of jurisdiction, and defendant, under protection of said spurious writ, proceeded to the accomplishment of its said illegal purpose with a high hand, willfully, maliciously, and wrongfully, in reckless disregard of plaintiff's rights, and persisted therein for more than two months and until the appropriation of said street was fully accomplished. And he shows that the said wrongs were further aggravated and the willful and wanton recklessness thereof was further accentuated by the fact that a hearing of plaintiff's motion to dissolve was by defendant resisted and prevented and postponed, and that the protective force of said injunction thereby maintained until defendant's wrongful and illegal purpose was accomplished and consummated, when, and not until then, an opportunity was afforded to have the illegal and spurious character of said injunction judicially declared, and the said wrongful and illegal proceedings ordered dismissed by order of a high court.

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All to the damage of plaintiff the sum of five thousand dollars, and therefore he sues.

G. Q. HALL, HALL & JACOBSON,
Plaintiff's Attorneys.

Green & Green, for appellant.

Baskin & Wilbourn, for appellee.

SMITH, C. J., delivered the opinion of the court.

While this declaration contains a great deal of irrelevant matter, it does distinctly allege that the laying of the second track has resulted in damage to appellants' property, for which, under *Williams* v. *Meridian Light & Railway Co.,* 110 Miss. 174, 69 So. 596, they are entitled to recover. The demurrer, therefore, should have been overruled.

Reversed and remanded.

STEVENS, J. (dissenting).

The sole question presented is whether the declaration sufficiently states a cause of action; whether it claims damages that the law recognizes and allows. The declaration is rather unique. The tongue of the pleader in dictating the document seems to have been unbridled and the pleading as a whole presents a general written assault on the defendant, the defendant's counsel, and the federal court which took jurisdiction of a prior injunction suit involving this same controversy. As well stated in the majority opinion, the declaration "contains a great deal of irrelevant matter," and the court is compelled to search a mass of wholesale criticism stated in unrestrained language in order to separate the good from the bad and determine the real negligence or wrong complained of. The statement of the litigation in the federal court has no bearing upon the right of the plaintiff to prevail in the present litigation. This is not a suit for the malicious prosecution of prior litigation, and the circuit court of ap-

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peals in disposing of this prior litigation expressly stated in its opinion that:

"There is no good reason in the record for holding that the order granting an injunction *pendente lite,* which is the subject of this appeal, was improvidently or erroneously granted." 186 Fed. 419, 108 C. C. A. 341.

The substance of the complaint in this case, as I see it, is about as follows: That appellants, the plaintiffs in the court below, are the owners of the premises fronting one hundred and fifty feet on Eighth street in the city of Meridian on which is located their home; that the appellee is a corporation owning and operating under express license from the city of Meridian a street railway system on and over various streets of the said city; that appellee company had been operating a single track on Eighth street for some fifteen or twenty years; that Eighth street is thirty-six feet wide from curb to curb; that appellee by permission of the city authorities built an additional track on Eighth street, or "double-tracked" its line on Eighth street; that plaintiff and other property owners filed a written protest; that from this written protest it appears that Eighth street was being paved and the street railway company wanted to double-track its line before the pavement was put down. It further appears that in the written protest, appellants requested "that the proposed paving of said street be proceeded with as speedily as practicable," but objected to the double-tracking of the street. It is then claimed that the double-tracking of this property operated to damage the private property of the plaintiffs, and that under section 17 of the Constitution plaintiffs had a right to recover damages. The elements of damage relied upon by the plaintiffs are: First, that in the construction of this additional track, appellee was compelled to haul many carloads of crossties and rails and to dump them from the cars onto the ground, and that in laying the track the company used several hundred negroes who made an unusual noise in front of the plaintiffs' property. It is further charged

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that this noisy construction work proceeded under the protection of an unwarranted injunction. It is then charged that the street has been rendered more noisy, dusty, and dangerous by the increased number of cars to be operated upon a double track. The next element of damage relied upon is that when cars are passing, vehicles drawn by animals cannot be left standing hitched at the curb in front of plaintiffs' premises. The declaration as a whole shows that the width of the street is thirty-six feet; that the space between the inner rails of the double tracks is five feet; that the space between the outer rails and the curb is ten feet and seven inches; and that a car would overlap the outer rail twenty-two inches. It is further shown on the face of the declaration that there is a clear space between a moving or standing car and the curb of eight and one-half feet. There is some basis for the calculation that there is a clear space between the nearest curb and any passing car of eight feet and nine inches. It is needless to say that the averments of facts must prevail over the mere conclusions of the pleader, and that if there is a conflict between the facts stated and the conclusions charged, then the facts must prevail. As I construe the declaration, there is no positive showing that appellants' right of ingress and egress is invaded or seriously interfered with. There is certainly no showing that appellee has touched the plaintiffs' property in any respect. There was no invasion or taking of the plaintiffs' property, and this is not a case also where the defendant has emitted smoke, cinders, or other deleterious agencies onto the plaintiffs' property. What, then, is the real complaint? It must be answered that the complaint is based altogether on the mere double-tracking of Eighth street without a showing as to how this double-tracking will in any wise interfere with the free use and enjoyment by the plaintiffs of their property. They can use their home as well after the double-tracking as before. There is ample room for vehicles to pass between moving street cars and the curb of plaintiffs' lot. The plain-

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tiffs can hitch a horse in front of their home or leave an automobile or other vehicle standing by their curb..

The question of whether the laying of a surface street railway system is an additional servitude has been presented to this and other courts with much ability and learning, and I shall not enter into any elaborate discussion of that subject. It was answered by our court in the very case relied upon by the majority opinion for reversing the present case. In this case of *Williams* v. *Meridian Light & Railway Co.*, 110 Miss. 174, 69 So. 596, it was expressly held that the laying of a second track by this very street railway company did not impose an additional servitude upon the street, and also was not "a public nuisance." The court there asked and answered both questions, stating:

"It seems to be settled by the great weight of authority that the first two of these questions must be answered in the negative, in so far as they are governed by common-law principles alone."

But proceeding, the court did hold that under section 17 of the Constitution the company was without power to construct or operate a street railway on the streets of Meridian "until compensation has first been made to the abutting property owners for any actual damage which will result to them therefrom, and an injunction will lie to prevent it from so doing." Recognizing, then, and following this opinion, the only question is whether the plaintiffs have sustained "any actual damage." What is "actual damage"?

There can be no recovery in this case for the alleged noise and the temporary obstruction in the street in laying the additional track. It is manifest that while the temporary noise of the construction gang might have inconvenienced the plaintiffs for a short while, it was not and is not a damage to their property. The declaration is bottomed upon section 17 of the Constitution, and the plaintiffs themselves rely upon this section of the Constitution and charge in general language that their "property" has been damaged. This is not a suit for

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personal inconvenience, but for the alleged permanent damage to the real estate. As a matter of course the laying of an additional track could not be accomplished without the services of employees and without the use of cross-ties, rails, and other material. The temporary obstruction of a reasonable portion of a street for laying public improvements and constructing buildings has always been permitted in every city. In the case of *Callanan* v. *Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831, the court, by Earl J., said:

"An abutting owner engaged in building may temporarily incroach upon the street by the deposit of building materials."

This statement was approved by Mr. Freeman, in 1 Am. St. Rep. 831, and the principle has been uniformly approved by all courts. There is, then, nothing in the averment of the declaration that various and divers carloads of material were hauled and placed along the street. There was no showing that there was an unreasonable deposit of material, or that any greater length of time was consumed in the construction than was absolutely necessary.

There can be no recovery also for the noise usual and incidental to the operation of cars along Eighth street. This was the express holding of our court in *Dean* v. *Southern Railway Co.*, 112 Miss. 333, 73 So. 55, L. R. A. 1917C, 346. The note to this last case in the L. R. A. points to other authorities on the subject. Nor is the laying of a double track in itself an unwarranted use of the highway. Before the laying of a double track would be actionable, the plaintiffs must show sufficient circumstances resulting in damages to them which the public generally do not suffer. There must be some invasion of the plaintiffs' right of ingress and egress or actual depreciation to their property. In the present case appellee had not only been chartered to operate a street railway system in the city of Meridian, but had been occupying Eighth street for many years. This street is reasonably wide and commodious. The double tracking

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of this street does not amount to a nuisance, and does not interfere with the plaintiffs' ingress and egress. Of course, neither a street railway company nor any other public agency has a right to close a householder's front gate and force him to enter his home through the back way. A street railway company cannot run over the plaintiffs' property or seriously interfere with his use and enjoyment, by swerving its track too near the curb line. A case similar to the present was that of *Birmingham R. R. L. & P. Co.* v. *Smyer,* 181 Ala. 121, 61 So. 354, 47 L. R. A. (N. S.) 597, Ann. Cas. 1915C, 863. That case involved the laying of a double track, and the street there was only 34 feet in width. The court, by MAYFIELD, J., among other things, said:

"We do not think that the laying of a double track in the street, which is thirty-four feet in width, and in the manner alleged in this bill, is an unwarranted use of the highway, and one not included in, nor contemplated by, the original dedication of the street in question. If one line of the kind in question is for the purpose of 'facilitating travel,' and 'imposes no additional burden upon the abutting owner,' nor a 'new servitude' upon the land, for which the owner is entitled to compensation, but is 'only an improved method of using the street for public travel,' then two lines or a double tracking of the same line, provided the public travel justifies and demands the same, must fall within the same category. It may be that one line or a single track will not afford proper or adequate means of transportation for the requirements and demands of a growing city; and, if not, then we can see no actionable wrong in the city's allowing or providing for two or more lines upon one street. We do not mean to say that a city cannot exceed its authority in placing so many car lines and cars on a given street as to constitute an additional burden, or a new servitude, not contemplated or intended in the dedication of the highway; but what we mean to decide is that a double track on the street in question, under the conditions shown in the

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bill, is not such an additional burden or servitude as would entitle the owner of an abutting fee to compensation. It is, we think, practically certain that the street in question will be as safe and as convenient for public travel in other vehicles, after the two tracks are laid, as now.

"It is very true that complainant and others who desire to have wagons and other vehicles stand at or near the curbing for the purpose of loading and unloading goods and freight may suffer some inconvenience; but, as we showed at the outset of the opinion, this is a convenience allowed them by the law, which must yield to that of public travel along the street, whether it be in cars, in wagons, on horseback, or in automobiles, or in omnibuses. The old adage that 'the street car is the poor man's carriage' is modernized so that the saying now is, 'The street car is the poor man's automobile.' The streets are primarily for public travel, for pedestrians and vehicles and conveyances in motion, and not for the purpose of their standing thereon. One of the laws of the road is, 'Move on; don't stop.' The policeman on duty in a crowded street proclaims it when he continually shouts, 'Move on; don't block the street or sidewalk.' If the street in question is much used by many people in vehicles, as is alleged, then the complainant's right to stand his wagon in the street, at his curb, must yield to the right of the many people to pass along the street, if both cannot be done at the same time. His rights and those of the public, the many travelers of the highway, are the same, whether they all be in wagons, carriages, omnibuses, automobiles, or in the street cars, except that the street cars must move on a fixed track, and cannot turn to the right or the left, as can other vehicles. The right of the public to pass is paramount to the right of the individual to stand."

I have quoted freely from this opinion because the learned judge in that case well states my views of the present case. He there well says that the street car is

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a poor man's automobile. Without a street railway system or its equivalent, a large city would be impossible. In the larger cities street cars are a necessity to the great army of employees and children attending schools. The laying of the track does not monopolize the use of the highway. The tracks are required to be laid in such manner as not to interfere with the free use of the street by other vehicles, and, as said by Judge MAYFIELD, the law of the street requires all to "Move on." It is not contemplated that street cars will stop in front of the plaintiffs' property, and the time when a car would be immediately in front of the plaintiffs' gate would be momentary. Its presence does not interfere with the plaintiffs' easement of light and air or access to the street, as is the case sometimes in the construction of elevated roads. The construction and operation of a street railroad promotes the very use for which the highway was originally dedicated. As stated by Mr. Nellis in his work on Street Railways, vol. 1, par. 82;

"The ordinary electric street railway with its trolley wire supported by cross-wires attached to poles near the outer edge of the sidewalks, with due regard to the abutting property owners' convenience, is but an improved method of using the street for public travel. There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not interfere unnecessarily with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights to property. Compared with a horse car, the electric car more certainly promotes the primary object of the highway. It moves more rapidly, is started and stopped with greater facility, and will more comfortably, and without obstructing the streets as much for travel by other means, move the greater number of persons the greater distance in a given time."

It must be remembered that appellee, then, is engaged in a lawful business, and that plaintiffs are in the attitude of claiming special damages caused by the opera-

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tion of a lawful business. I take it that the framers of our Constitution employed the use of the word "damaged" in the sense in which the courts were accustomed to construe that word. The supreme court of Washington, in the case of *Taylor* v. *Chicago, M. & St. P. R. Co.*, 85 Wash. 592, 148 Pac. 887, L. R. A. 1915E, 634, quotes to approve the language of the supreme court of Georgia in *Austin* v. *Augusta Terminal R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, as follows:

"In a popular sense, the word 'damage' does frequently mean depreciation in value, whether such depreciation is caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for 'damages' the word always refers to some actionable wrong—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. In this sense, and as a well-defined law term, it was used in the Constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damnified, but it did not give him compensation for depreciation in value caused by any legal act, since in law such an act was innocent, and therefore harmless, or, if not actually harmless, '*damnum absque injuria.*' There is nothing in the language of the Constitution or in the debates, or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term."

The mere laying of a street car track does not *ipso facto* confer a right of recovery. There must be a showing of some damage which the law recognizes. As stated by Mr. Nellis in paragraph 80:

"Such an owner is entitled to the use of the street as a means of access to his property, and for light and air, whether the fee of the land in the street is in the municipality in trust for the purpose of public travel or in him subject to the public use, and of these rights he cannot be deprived without compensation."

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Any interference with these rights would operate to depreciate the property, and such rights would be safeguarded by section 17 of our Constitution. Deleterious agencies could not be projected upon the plaintiffs' property. But the present declaration does not make it a case where any of these rights are violated by the defendant company. This case is to be remanded for a new trial. What, I ask, is to be presented to the jury? There must not only be an averment, but proof of some depreciation to the rental or market value of the property, and under the present pleading no such issue can possibly be presented to the jury in this case, and, if presented, there could be given the jury no legal guide except a peremptory instruction to find for the defendant.

In filing these reasons why I dissent, I suggest that the reporter set out the declaration in this case in full, since the document must be construed as a whole and all admissions therein construed more strongly against the pleader.

BANK OF LEXINGTON v. COOPER.

[76 South. 659, In Banc.]

1. MORTGAGES. *Mistake of recorder. Effect. "Appears on face of record." "Appears by the record."*

Under Code 1906, section 2796, providing that where the remedy to enforce any deed of trust, etc., "appears on the face of the record" to be barred by the statute of limitations, the lien shall cease as to creditors and subsequent purchasers for a valuable consideration without notice unless within six months after such remedy is barred, the fact that such deed, etc., has been renewed or extended is duly filed for record. The fact that the clerk, in recording a trust deed, described the maturity of the note as January, 1904, instead of its true date January, 1905, would

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not bind the beneficiary where it discharged its duty by filing the trust deed for record, there being no difference between the phrase "appears on the face of the record" and the phrase "appears by the record."

2. MORTGAGES. *Priorities. Recording. Patent ambiguity.*
Where the record of a trust deed recited the maturity of the note secured thereby as January 1, 1904, and the trust deed as dated April 14, 1904, which described the note as bearing even date therewith, a patent ambiguity was disclosed which put the holder of a subsequent trust deed upon notice, since a promissory note of date April 14, 1904, could not possibly be made to mature at the earlier date of January 1, 1904.

3. MORTGAGES. *Priorities. Recording. Patent defects.*
Where the renewal trust deed correctly described the true maturity of the new note, the fact that the scrivner by mistake dated the deed 1911 instead of 1910 would not bind the beneficiary in favor of the holder of a subsequent deed of trust, where the acknowledgment bore date of 1910 and the instrument was filed for record in 1910, thus making the mistake patent upon the face of the record.

4. MORTGAGES. *Defective record. Secondary liens. Creditors. Subsequent purchaser.*
Where plaintiff had a live lien unaffected by any mistake of the clerk in recording, when the first trust deed to defendant was made and the original consideration by defendant was carried forward into a renewal trust deed, this remained a secondary lien within the principle that defendant was not a "creditor or subsequent purchaser" within Code 1906, section 2796, providing that a lien shall cease as to creditors and subsequent purchasers if a trust deed, etc., appears from the record to be barred.

APPEAL from the chancery court of Holmes county.
HON. A. Y. WOODWARD, Chancellor.

Bill by the Bank of Durant against J. A. McDonald and the Bank of Lexington, in which R. L. Cooper, special agent was substituted as plaintiff. From a decree for complainant, defendant appeals.

This case presents conflicting claims as to the priority of liens of certain deeds of trust held by appellant Bank of Lexington and the appellee as special agent of the Bank of Durant. The facts are that one J. A. Mc-

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Donald, on April 14, 1904, borrowed from the Bank of Durant six hundred and forty-five dollars, evidenced by a promissory note for said sum due January 1, 1905. To secure this note McDonald executed a deed of trust on certain lands, a description of which is not material to a decision of this case, but which are fully described in a deed of trust executed by McDonald to secure the said loan. The note and deed of trust bear the same date, and the original trust deed described the note and gives the true date of its maturity. The note was also signed by Mrs. J. A. Hamilton. The evidence shows that Mrs. Hamilton was an accommodation surety. The deed of trust was duly acknowledged and recorded. McDonald did not pay the said note, and on October 11, 1910, he executed a new note to the Bank of Durant, due and payable January 1, 1911, and to secure the same executed a new deed of trust on the same land embraced in the first deed of trust. The new trust deed fully described the new note, its date and maturity, and recited expressly that it was given in renewal and continuation of the old indebtedness, the exact recital being:

"Said note being a renewal and continuation of the note and deed of trust given the said bank on April 14, 1904 (due January 1, 1905) and of record on page 575, Book 14 at Lexington."

The renewal trust deed also described accurately the true maturity of the new note as "due and payable on the first day of January, 1911." In preparing the renewal trust deed Mr. Cooper, an officer of the Bank of Durant acting as scrivener, by mistake dated the instrument "the 11th day of October, A. D. 1911." The proof shows that the real date was October 11, 1910. In addition to the testimony of Mr. Cooper on this point, the acknowledgment bears date October 12, 1910, the instrument was filed for record with the chancery clerk October 20, 1910, and recorded the same day. The true date of the instrument is further reflected by its recitals showing, among other things, that it was executed to se-

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cure a note maturing January 1, 1911. The original promissory note which this instrument secures bears date October 11, 1910, and the true date of its maturity was properly written upon its face.

On June 15, 1908, Mr. McDonald being indebted to the Bank of Lexington, executed a deed of trust in favor of the said Bank of Lexington to secure an indebtedness of three hundred and sixty-one dollars and sixty-six cents. On March 11, 1910, he executed a second deed of trust to the Bank of Lexington for one thousand one hundred and eighty-eight dollars and thirty-seven cents, thereby renewing the old indebtedness and enlarging the same. Thereafter, on January 26, 1912, a third deed of trust was executed by McDonald in favor of the Bank of Lexington for one thousand eight hundred and fifty-four dollars and thirty-seven cents. On January 14, 1915, the Bank of Durant filed the bill in this cause against J. A. McDonald, then a non-resident of the state and residing in the city of Memphis, Tenn., and against the Bank of Lexington and certain other defendants who claimed liens upon the property. The bill sought foreclosure of the deed of trust held by the complainant. A demurrer interposed by the defendants McDonald and Bank of Lexington was withdrawn, and after the bill had been amended by the complainant, the Bank of Lexington and its trustee, L. M. White, filed an answer. A decree *pro confesso* was taken against the defendant McDonald, and the cause proceeded to trial upon the bill, answer, and proof. It appears that after the original bill was filed the complainant ascertained that in recording the first deed of trust in favor of the Bank of Durant the clerk in recording the instrument described the maturity of the note as January 1, 1904, instead of its true date, January 1, 1905, The amendment charged that neither the complainant nor its attorney had ever seen or examined the record of this trust deed, and did not know that there was an error in recording this instrument until after the original bill in this cause had been filed. The answer of the Bank of

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Lexington charges that the note executed by McDonald on April 14, 1904, is shown by the record to have matured January 1, 1904, and was therefore barred when the complainant took a renewal note and trust deed October 11, 1910. It further appears that in February, 1915, after the bill was filed, the Bank of Durant consolidated with the People's Bank of Durant and that appellee, R. L. Cooper, was appointed by the shareholders of the Bank of Durant as special agent to collect this and other indebtedness. An order was entered by the court, directing that the suit be continued by Mr. Cooper as special agent "for and in behalf of said bank and the parties in interest." It further appears that, pending litigation the Bank of Lexington had its trustee foreclose the deed of trust in favor of the Bank of Lexington, and the latter appeared at the trustee's sale and bid in the property for the consideration of fifty dollars. The final decree was in favor of the complainant, and from this decree the Bank of Lexington prosecutes an appeal.

The assignments of error challenge the action of the trial court in reforming the deed of trust executed October 11, 1910, so as to correct the error of the scrivener in dating the same, the action of the court in decreeing that the indebtedness due the appellee was a prior lien over the indebtedness due appellant, and the action of the court in granting the prayer of the bill and in giving complainant priority of lien.

E. F. Noel, for appellant.

According to the undenied facts, the remedy to enforce the deed of trust relied on, "appears on the face of the record to be barred by the statute of limitations." The penalty of which, according to the statute is "the lien shall cease and have no effect" unless the renewal of extension or new deed of trust be put of record within six months. Code 1892, sec. 2462; Code of 1906, sec. 2796.

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According to the Code the debt secured need not be barred, but only as appears "on the face of the record." It is the appearance, not the reality, which constitutes the bar here claimed; and this appearance is of a note maturing according to "the face of the record," and the actual date of the execution according to the recitals of the execution clause, of the deed of trust *vel non* to defeat the statute of limitations, according to these two deeds of trust, on the face of the record, the secured debt had been barred from January 1, 1910, to October 11, 1911, to defeat this bar of one year, sixteen months and eleven days, appellant takes two exactly contradictory positions; the one that the appearance of the face of the record should not be considered as against the actual recital of the first deed of trust, but that the deed of trust and not the action of the officers who recorded the same should control; and the other position is that the actual recital actuall written, by the president of appellee's bank October 11, 1911; and as written signed, and acknowledged as of the date written should not be considered, and should not control but that the dating of the acknowledgment and of the filing of the instrument for record should control the recited date.

We do not think that the counsel who filed this brief could find, or that any one else could find, a case which holds that an essential recital in a deed of trust, such as the actual dating in this case, written by one of the parties, to the deed of trust and signed by the other, can be changed by the officer who takes the acknowledgment or the officer who files the instrument for record, or both combined. Acknowledgments serve only to authenticate instruments for purposes of record, and record only to give constructive notice to the world. Neither carry the deed of trust, or were even intended to carry into the deed of trust, something not therein contained nor to alter its contents. In an action for the reformation of an instrument, where actions for reformation can ever effect an intervening *bona-fide* incumbrancer, who

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is only affected by what the instrument itself contains, unaided by its means of authentication.

Therefore, I confidently submit that the two positions, both of which are vital, and both of which are taken by appellee, are contradictory, and that the failure of either defeats its claim; and that if the records, according to their appearance and face, control, appellee is defeated; and even if the originals themselves a part of entries of acknowledging or recording officers thereon, be considered, likewise he is defeated.

J. Weiner, for appellee.

There is no inconsistency at all between section 2796 of the Code and the decision in the case of *Mangold* v. *Barlow,* 61 Miss. 593. Each covers an entirely different proposition. The argument for appellant and the several cases cited as to construction are not at all applicable to the facts shown by the record in this case, and admitted by appellant. It is but a confusion of different principles, and of the plain facts as they appear. There is no occasion for construction.

Section 2784 of the Code makes it imperative that the instrument be acknowledged before it is recorded, and makes the acknowledgment an essential part of the conveyance in the record thereof. Section 2787 as well as 2784 both require the instrument to be lodged with the chancery clerk for record. Neither section requires any more. This was the law long before the case of *Mangold* v. *Barlow,* and was never changed, and still is the law.

When the statute, sec. 2796, says that: "Where the remedy to enforce a deed of trust, etc., which is recorded, appears on the face of the record to be barred by the statute of limitations, the lien shall cease and have no effect, etc., unless within six months such remedy is so barred the fact that such deed of trust has been renewed or extended be entered on the margin of the record thereof by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust or lien,

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noting the fact of renewal or extension, be duly filed for record within such time."

The statute means, of course, that where the original instrument was recorded correctly, it does not mean a case where the "face of the record," shows an untrue proposition, caused by the negligence or mistake of the clerk in recording the original trust deed. The statute only requires the mortgagee to lodge the instrument with the clerk for record; it does not require him to go and examine the records and see whether or not the clerk has recorded it correctly.

The doctrine established in this state by the decision in the case of *Mangold* v. *Barlow,* means that "where a man has done his duty and all that the statute requires of him he shall not suffer if anyone is mislead by the negligence or mistake of the clerk. If a subsequent purchaser or mortgagee is thus mislead, he must look to the clerk for redress. "From the time the instrument is lodged with the clerk for record, it becomes notice of what it contains and not what the recording officer may make it show on the record." When section 2796 of the Code was enacted, the legislature never meant to nor did they change this doctrine. In the *Mangold* v. *Barlow* case there was a mistake made by the clerk in copying the lands described in the deed, but the principle there established covers the case at bar completely. Before this statute was enacted, a person might hold a deed of trust and when the debt or note was about to become barred, or for that matter after it was barred, have the debtor renew it by appropriate words on the back of the note or trust deed and continue to do so indefinitely. To remedy this the legislature enacted that where the debt is renewed such renewal shall be put on record within six months of the time it appeared barred on the record. Now this was promptly done in the case at bar. The note of April 14, 1904, due January 1, 1905, applying the six years statute of limitation, did not expire before January 1, 1911, however it was renewed and a new deed of trust given properly acknowledged

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and filed for record all in October, 1910. The Bank of Durant was not guilty of any laches or delay. It did its duty. And in such case the principle and doctrine established in this state still prevails, otherwise the legislature would have expressed it differently. All the statutes simply requiring the acknowledgment by the grantor and the lodgement of the trust deed or other instrument with the chancery clerk for record have been reenacted in each Code since the case of *Mangold* v. *Barlow,* and have not been changed. In line with this doctrine and with all the Code provisions on the subject, the very language of section 2796 accentuates this most conclusively when it says: "or a new mortgage, deed of trust or lien, noting the fact of renewal or extension, be duly filed for record within such time."

Counsel for appellee lays undue stress on the words "face of the record." On page 2 of the brief it is contended for appellant that the statute requires the face of the record to be changed "by marginal entry or recording a new deed of trust." And it is further claimed for appellee that "there is no claim nor pretense that by marginal entries or otherwise there was any such change of the face of the record." This is a mistake for there was the renewal, promptly and timely, not by marginal entry but more forceful, it was by new deed of trust as provided by the statute. (According to appellee's contention they give this statute a most tragical construction.) Surely they do not mean to say that the new deed of trust should have been recorded or copied on the margin of the record or on the very face or top of the former deed of trust.

It may not be amiss to note here in connection with the renewal deed of October 11, 1910, that section 2805, Code 1906, requires the clerk to certify the hour and minute, the day and the month and the year when he received it, and when recorded, etc., to mark thereunder the number of the book and the page; and the instrument as to parties without notice takes effect from the very time of such delivery. Section 2788, Code.

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STEVENS, J., delivered the opinion of the court.

(After stating the facts as above). Appellant contends that it had the absolute right to rely upon the recitals appearing on the face of the recorded instruments, and accordingly that the court, in disposing of the conflicting claims of the parties hereto, must regard: First, the true maturity of the first note given the Bank of Durant as January 1, 1904; and secondly, must regard the true date of the renewal trust deed executed to the Bank of Durant as October 11, 1911. These are the two mistakes which the undisputed proof shows to appear on the records in the chancery clerk's office. If these contentions prevail and appellee is bound by the mistake of the clerk in recording, then, appellant submits, that the statute of limitations barred the first note on January 1, 1910, and no renewal was entered of record within six months thereafter. Appellant relies upon section 2796, Code of 1906, which reads as follows:

"Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitation, the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. And where a suit shall have been brought to keep a judgment alive within seven years from the rendition of such judgment, the general lien of such judgment shall expire as to creditors and subsequent purchasers for a valuable consideration without notice, at the end of seven years from the rendition of such judgment, notwithstanding such suit to keep alive the judgment, unless a notation to keep

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alive such judgment shall be made on the judgment roll within six months after the expiration of seven years from the time of the rendition of such judgment."

Counsel stress and rely upon the words "on the face of the record." Section 2788 of the Code expressly provides that a deed of trust and other instruments "shall take effect, as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, only from the time when delivered to the clerk to be recorded." Section 2787 requires deeds of trust and mortgages to be recorded, and declares that they "shall be void as to all creditors . . . unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded." Our court construed sections 2787 and 2788 in the case of *Mangold* v. *Barlow*, 61 Miss. 593, 48 Am. Rep. 84, and in strong terms aligned this court with those authorities which hold that a grantee has done all required of him when he deposits his deed or deed of trust with the proper officer for record and is not bound by a mistake of the clerk in recording. Our court, speaking through CAMPBELL, C. J., says:

"Does the grantee acquit himself fully of all duty when he delivers the deed to the proper officer for record, or is it his duty to see that the instrument is properly recorded? And if a mistake is made in recording by which a subsequent grantee is misled and injured, whose claim shall prevail, that of the first grantee, who relied on the officer to do his duty, or of the second grantee, who, in the faith that the record is true, acts upon it? Shall the deed prevail or the record of it? There is great contrariety of opinion on this subject in other states. . . . After the most careful consideration we range ourselves with the minority, and hold that a grantee fully acquits himself of all duty imposed by law when he lodges the instrument with the proper officer for record, and from that time it is notice to sub-

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sequent purchasers and creditors of what it contains, and not of what the recording officers may make it to show on the record. The clerk is not the agent of the grantee, and he is not responsible for his blunders. He has as much right to rely on the fidelity of the officer as has a subsequent purchaser. . . . The first grantee, having done all that he is required to do to give notice of the instrument, may safely repose on the presumption that the recording officer has done his duty, and if subsequent purchasers or creditors suffer injury from official negligence or misconduct, they must seek redress from the party at fault, and cannot visit the loss on him who has done no wrong. . . . It is not for his benefit that the recording is to be done, but for others. The state has undertaken to have the recording done, and if one suffers from the negligence of the officer he must seek redress from the officer."

At the time this opinion was rendered the authorities were in conflict, many cases holding at that time that the clerk is the agent of the grantee, and the mistakes of the clerk must be looked upon as the mistakes of the party who seeks recordation of his instrument. Our court repudiated the reasoning of the opinions which declare that where one of two innocent persons must suffer in a case of this kind, the loss must fall upon the person who lodges with the clerk the instrument to be recorded, on the theory that the clerk acts for the beneficiary or grantee and is under his control. Our court adopted the view that the clerk is a public officer employed to serve the public generally, and that a party offering a document for record in due form and properly acknowledged or proved has a right to presume that the clerk will perform his duty. Mr. Jones in his work on Mortgages, in discussing the two views, says:

"The other view prevails under statutes which make the deed operative as a record from the time it is filed for record, and the apparent weight of authority is that any error in transcribing the deed, as, for instance, in the date of the deed or of the acknowledgment, or in the

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sum secured by a mortgage, does not prejudice the grantee or mortgagee. The mortgagee is regarded as having discharged his entire duty when he has delivered his mortgage, properly executed and acknowledged, to the recording officer, and as being in the same attitude as if the deed were at that moment correctly spread upon the record book, so that no error in transcription can deprive the deed of its operation as a recorded instrument, and subsequent purchasers are charged with constructive notice, notwithstanding the officer does not properly record the instrument. . . .

"The grantee is under no obligation to supervise the work of the recorder, and see that he spreads the deed upon record, or that he puts it upon the index. If, however, the record is such that it suggests a probable mistake in recording, it puts purchasers upon inquiry and charges them with notice of what the deed contains. In discussing a case where a purchaser was put upon inquiry by examination of a defective record showing his sources of title, which disclosed intervening equities, the United States Court of Appeals [The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78], per Judge TAFT, said: 'The proper construction of the recording acts charges every person taking title with all conveyances or mortgages made by any one in the chain of title while he holds title, whether the recording of such conveyances occur then or not. If, upon the record, a prior conveyance seems to be defeated by a subsequent one through delay in recording, then the person taking title must inquire as to the facts which might defeat the statutory effect of such prior record. . . . A purchaser is charged with notice of his chain of title, whether the grantees therein are bona fide purchasers or not.'" Jones on Mortgages (7 Ed.), par. 517.

But we are asked to enforce a different rule and to apply a different interpretation to section 2796, declaring that when a lien appears on the face of the record to be barred, it ceases unless renewed within six months. In our opinion counsel play upon the words,

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"on the face of the record." If the record in the present case spoke the truth, there would, of course, be no controversy. This statute did not contemplate a false or fraudulent record. There is no more reason for holding the beneficiary of a deed of trust bound by a mistake in the record under this statute than there is to bind the grantee or beneficiary under sections 2787 and 2788. Under either statute the grantee or beneficiary discharges his duty when he files his instrument for record. The express obligation of section 2796 under review is that the beneficiary must either have the renewal or extension entered on the margin of the record, or to have a new deed of trust "duly filed for record." In the present case appellee Bank of Durant took a renewal deed of trust in due form, properly acknowledged, and had it "duly filed for record." There is no difference between the phrase "appears on the face of the record" and the phrase "appears by the record." We have often heard the expression that the holder of a deed is charged with notice of all recitals appearing on the face of his title deeds. The face of the record is nothing more than the recitals of the record and it is always contemplated that these recitals are the true transcripts from the original and not false recitals. It is suggested that the legislature, when it in 1896 first enacted the statute appearing as section 2462, Code of 1892 (2796, Code of 1906), intended to change the holding announced in the *Mangold-Barlow Case, supra*. But there is no real basis for such inference. Our court was construing what was then section 1213, Code of 1880, and this section was brought forward in the Code of 1892 and again incorporated in the Code of 1906, and has neither been repealed nor amended. The legislature was evidently content with the construction which our court had placed upon that statute, and, following the judicial construction, re-enacted the law and thereby approved the construction which the court had seen fit to place upon the statute. The only change was the enactment by the legislature in 1896 of the statute

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now appearing as 2796 of the Code, and in construing this new statute we are governed by the same principles announced by the court in the Mangold-Barlow Case. The opinion in that case announces in language most emphatic that the clerk is not the agent of the party who offers a document for record, and that the holder of the instrument, whether deed or deed of trust, is not obliged to oversee the work of the recorder or to follow up the clerk to ascertain whether he has discharged his official duty. The legislature has not changed the construction, and the principles which controlled the court in the Mangold Case should control in the present case. There can be no difference in the legal principles governing both cases.

But let us examine a little further and a little deeper the real defense of appellant Bank of Lexington. Was appellant misled by the mistake of the clerk in reciting the maturity of the first note as January 1, 1904? The recorded trust deed was dated April 14, 1904, and described the promissory note which it secured as "bearing even date herewith." The instrument then as recorded shows upon its face that it secured a promissory note dated April 14, 1904. A promissory note of that date could not possibly be made to mature at the earlier date of January 1, 1904, several months prior to its execution. The record, then, discloses a patent ambiguity, and put the Bank of Lexington upon inquiry as to the true facts. The recorded instrument does not recite that it is given to secure an indebtedness which matured January 1, 1904, some months prior to the date of its execution, but expressly recites that it is given to secure a promissory note. The debt then is evidenced by commercial paper, and the recitals as to the description of this commercial paper are material and pertinent. Mr. Jones in paragraph 524 declares that the record is notice, not only of the contents of the mortgage, but of all matters suggested thereby. He says:

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"Although the debt or the property be not fully described, the record is notice of all that is said about it, and a purchaser is bound by the statement made, and by the information he is put upon the inquiry to find out. . . . It is notice not only to purchasers, but to the subsequent creditors as well. . . . The record imparts notice of all the facts which could have been ascertained by an actual examination thereof, including not only those recited in the record, but also material matters suggested thereby, which might be disclosed by reasonable inquiry."

And in speaking about the description of the debt secured and the necessity to make inquiry, Mr. Jones, in paragraph 579, says:

"A general description of the debt is sufficient to put all parties interested upon inquiry, and to charge them with notice of all facts that could be obtained by the exercise of ordinary diligence and the prosecution of the inquiry in the right direction. A party willfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence."

In the case at bar, if the Bank of Lexington had pursued this inquiry, they would have at once ascertained that a mistake had been made by the recorder. There was no mistake in the promissory note, and either this note or the original trust deed in the hands of the Bank of Durant would have disclosed the truth. As a matter of fact and of law the note was not outlawed until January 1, 1911. Prior to this time, and on October 11, 1910, a renewal was executed and at once filed for record. This indebtedness was never paid, constituted a prior lien, and justified the final decree rendered in this cause. There is no merit whatever in the argument that the Bank of Durant is bound by the mistake of the scrivener in reciting the date of the renewal trust deed as October 11, 1911. The mistake is patent upon

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the face of the record, and any reasonably prudent man would at once detect the mistake by an inspection of the record. This mistake is shown: First, by the acknowledgment; secondly, by the date the instrument was filed with the clerk for record; and, thirdly, by the recitals or description of the indebtedness contained in the instrument itself. On the trial of the case the mistake is further shown by the testimony of Mr. Cooper.

There is another view of this case about which a few remarks would be proper. The first deed of trust in favor of the appellant Bank of Lexington was January 15, 1908. At that time admittedly appellee held a live lien, unaffected by any mistake of the clerk in recording. At the time the Bank of Lexington took its first lien, it at least had constructive notice of the prior lien in favor of the Bank of Durant. The advances which the Bank of Lexington then made to Mr. McDonald were never paid, but were carried forward into renewal trust deeds here claimed to be priorities. Under any view of this case, then, the original consideration advanced under the first deed of trust was and has always been a second lien. There is no showing whatever that appellant was actually misled by any of the recitals of record. Appellant showed by its own witnesses that its offices did not search the records and are affected only by constructive notice. The case, then, would appear within the principle announced in *Klaus* v. *Moore,* 77 Miss. 701, 27 So. 612, where our court through CALHOON, J., said:

"But section 2462 was enacted to protect creditors and purchasers who parted with something on the appearance of the record, and cannot be availed of by Klaus. He took his junior trust conveyance before there was the appearance of any bar on the record, and is neither creditor nor subsequent purchaser within the meaning of this statute."

There is no controversy about appellee enlarging its debt. The indebtedness here decreed to be a first lien has been a legal indebtedness since April 14, 1904, and

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was outstanding many years before the Bank of Lexington ever advanced a cent. Equity and the law are with the appellee in this case, and we see no good reason why the decree of the learned chancery court should be disturbed.

Affirmed.

ETHRIDGE, J. (dissenting).

I cannot accept the construction the majority places upon section 2796 of the Code of 1906. This section reads as follows:

"Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitation, the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. And where a suit shall have been brought to keep a judgment alive within seven years from the rendition of such judgment, the general lien of such judgment shall expire as to creditors and subsequent purchasers for a valuable consideration without notice, at the end of seven years from the rendition of such judgment, notwithstanding such suit to keep alive the judgment, unless a notation to keep alive such judgment shall be made on the judgment roll within six months after the expiration of seven years from the time of the rendition of such judgment."

The deed of trust in suit for the appellee, as taken, made the debt mature on January 1, 1905, but by mistake in the recording, the record recited that the note

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matured January 1, 1904. As the statute begins to run on a debt from the date when a suit can first be brought, it would be the date the note was due and payment refused. The statute would begin to run, if the record governed, January 1, 1904, and the right as well as the remedy would become barred January 1, 1910, and this appears of record to be the fact. If the statute means what it says, "appears on the face of the record to be barred by the statute of limitation," then in March, 1910, when the appellant took its second deed of trust, the lien of the appellee appeared to be barred by the record and it was not renewed, nor was any entry made on the marginal record, showing renewal within six months from the date which it appears of record to have been barred. This statute (section 2796) first appeared in our law with the adoption of the Code of 1892, being section 2462 of the Code of 1892, which was long after the decision in *Mangold* v. *Barlow*, 61 Miss. 593, 48 Am. Rep. 84. At the time that decision was rendered there was no such statute as section 2796 of the Code. In delivering the opinion of the court in the *Mangold* v. *Barlow Case*, the court frankly conceded that the decision then rendered was against the decided weight of authority, the court saying:

"The decided weight of authority seems to be in favor of the view that the record may be relied on by a subsequent purchaser, and that he cannot be affected by a deed not truly recorded (citing numerous authorities). After the most careful consideration we range ourselves with the minority, and hold that a grantee fully acquits himself of all duty imposed by law when he lodges the instrument with the proper officer for record, and from that time it is notice to subsequent purchasers and creditors of what it contains, and not of what the recording officers make it show on the record."

Manifestly, the present section of the Code was enacted for the purpose of placing this state in line with the majority of the states of the Union upon this

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proposition. It seems to me that there could be no doubt of the wisdom of the present statute, for how can a person dealing with property be expected to hunt up all incumbrances that may appear on record whose actual security may not be within the limits of the state or within reach of any reasonable inquiry? The section as construed by the court puts the onerous burden upon the person either buying or becoming a creditor to actually look up recorded conveyances and compare them with the record of the conveyance, an undertaking that manifestly is impractical and cannot be carried out in practice. The construction placed upon the section by the majority absolutely makes section 2796 a legislative farce, because if the rule is to remain the same, and if what appears on the face of the record is not to govern as against the actual instrument given, it would be foolish to put a statute of this kind on the book.

In regard to the proposition advanced in the majority opinion that the face of the record showed or recited that the note secured by the mortgage was of even date and tenor as the instrument, the deed of trust, which deed of trust was dated subsequent to January 1, 1904, and that this would charge subsequent purchasers and incumbrancers with the duty of making inquiry, I think it sufficient to say that the date of the indebtedness secured is not material. It has no effect whatever in disclosing whether or not the remedy would be barred by the statute of limitation. The statute of limitation does not run from the date of an instrument, but runs from its maturity, and the record showed that the deed of trust would be barred by the statute of limitation on January 1, 1910, and therefore the second deed of trust taken by the appellant would be protected. The usual printed forms used in this state have printed, "of even tenor and date," when referring to the note, and does not usually describe the note as to date by day of month and year.

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In regard to the proposition that the first deed of trust taken by the appellant was taken on June 15, 1908, during the period when the appellee's deed of trust appeared to be in full force of record, I think that this contention is answered by the fact that in March, 1910, after the deed of trust of the appellee appeared from the record to be barred, that the appellant took a new deed of trust, advancing additional moneys, and extending the time for the payment of the indebtedness in 1908, under which contract it could not bring suit until the maturity of the paper then taken. I think this is sustained by the authority of *Schumpert* v. *Dillard, etc., Co.*, 55 Miss. 348. I quote the second syllabus of this case as follows:

"A mortgage given for a pre-existing debt is not invalid for want of valuable consideration, as against a prior unrecorded mortgage, where the time of payment of the debt is extended by a note taken four days before the execution of the mortgage, if it appears that the giving of the note and the execution of the mortgage formed one transaction."

Inasmuch as the appellee did not renew its security within six months from the date that it appeared to be barred, it became absolutely barred as to appellant, and could have no further effect upon the rights of the appellant. The appellant could rightfully treat it as being at an end, and could either foreclose his debt due or take a new security relying for protection upon the record. It is much easier for a mortgagee or a lienholder to see that the instrument is correctly recorded than it is for the general public to make such comparison, for the reason that the paper to be compared with the record is in the hands of the mortgagee, while another person can only secure the mortgage by permission of the holder, and manifestly no sensible business man would surrender his mortgage or deed of trust to every person, or to any person for that matter, for the purpose of carrying it to the county records and mak-

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ing a personal comparison. If the clerk makes a mistake in recording he is responsible to the holder of the paper, and such holder may maintain an action upon the clerk's bond for an losses sustained by him on account of such mistake.

The majority refer to the case of *Klaus* v. *Moore,* 77 Miss. 701, 27 So. 612, where the court, speaking through Judge CALHOON, said that the statute applied only where a person had parted with something on the face of the record, or who had been misled to his injury by the record. If we treat the appellant as being charged with notice of the record and treat him as having knowledge of the record, then when he took his security without actual knowledge of the appellee's rights, he has parted with something, and has been injured by the record, and that case should be authority for the appellant rather than the appellee. In that case the controversy, however, was different from the one here. It has but slight bearing upon this proposition. I think in addition to this that the holder of a deed of trust or mortgage should see that the debt which the mortgage secures is properly described in the mortgage, and, if it is not, that he suffers the consequences of such carelessness rather than an innocent purchaser for value or a creditor. For these reasons I am of the opinion that the judgment should be reversed and the appellant's claim in 1910 should be preferred over the appellee, but the claim of the appellant taken in 1912 should be subordinated to the appellee.

ABASI BROS. *v.* LOUISVILLE & N. R. Co.

[76 South. 665, In Banc.]

1. TROVER AND CONVERSION. *Title. Custody of replevied property.* Where a carrier in whose custody the sheriff left replevied property, failed to deliver it to the defendant in replevin, who gave

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bond for it but turned it over to the plaintiff in replevin and defendant thereupon sued in trover, tendering the issue of title, which was decided against him, the defendant in the trover suit was not liable, since the bond given by defendant in replevin did not confer title, but at most merely the right of temporary possession.

2. TROVER AND CONVERSION. *Taking of property. Evidence. Sufficiency.* The court held that the evidence set out in the opinion was sufficient in this case to show that the plaintiff in replevin to whom one defendant gave the property for which the other defendant sued in trover, lost the property replevied through the act of some person without authority of law.

3. CARRIERS. *Delivery of property to stranger. Liability.* If a shipper of property is not the real owner, the carrier may, upon demand, turn the property over to the true owner and defeat the shipper's claim or suit for failure to deliver by an affirmative showing that it had turned the goods over to the true owner.

4. CARRIERS. *Delivery of property to stranger. Liability.* Presumptively the bailor or shipper is entitled to the property as against the carrier, and the bailee cannot himself hold the property by setting up title in a third person, but this rule has no application when the carrier yields to the paramount claim or title of the true owner.

5. CARRIER. *Action for failure to deliver. Burden of proof.* To justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery.

ON SUGGESTION OF ERROR. FOR former opinion see 75 So. 756.

The facts are fully stated in the opinion of the court.

Mize & Mize, for appellants.

White & Ford and *B. E. Eaton,* for appellee.

STEVENS, J., delivered the opinion of the court.

Upon a careful consideration by the full court of the suggestion of error, we conclude that we were in error

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in reversing the judgment of the trial court, and that the suggestion of error should be sustained, and the judgment of the learned circuit court affirmed. It is stated in the opinion heretofore delivered that this case is different from the ordinary case where goods are consigned to a railroad company for shipment and are by the railroad company delivered to a party other than the consignee. We stated that the question of ownership presented an issue which was pending in the circuit court in the replevin suit, and that Abasi Bros., who had given bond for the forthcoming of the property, had the right to the possession, and the option of either returning the property in pursuance of the judgment of the court in the replevin suit or in lieu thereof to pay the value. We overlooked, or at least did not attach due importance to, the fact that appellants, the very parties who had given the forthcoming bond, did not look to the replevin suit for the protection of their rights, but, without waiting for a trial of the action in replevin, initiated the present litigation by filing the usual declaration in trover.

The situation of the parties should be remembered. Both the parties to the present action were defendants in the replevin suit. The plaintiff in the replevin suit was the Gulfport & Mississippi Coast Traction Company. This action of replevin was instituted against three defendants, and this without any showing that the three defendants had any joint control over the property, or that one defendant was in any wise responsible for the acts of his codefendant. The condition of the bond executed by the one defendant, Abasi Bros., was to have the property before the court "to satisfy the judgment of said court in the action of replevin by said plaintiff." Abasi Bros., as a defendant in the replevin suit, never in fact got possession under the bond. Before they obtained the actual possession, their codefendant, the Louisville & Nashville Railroad Company, turned the property over to what

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it conceived to be the real owner. Abasi Bros. then did not seek an order of the circuit court having jurisdiction of the replevin in aid of their right to possession under the bond; and this record does not show what disposition, if any, has been made of the replevin suit. When their codefendant, the Louisville & Nashville Railroad Company, turned the property over to the plaintiff in replevin, appellants anticipated any proceedings that might be had in the replevin suit by themselves instituting this separate action against their codefendant in the replevin suit for the actual value of the property. In their declaration they charge that they are the owners of the property and are entitled to recover the full value thereof. They, as plaintiffs in the present action, tendered to the court and jury an issue as to the ownership of the property. This issue was submitted to the jury under proper instructions of the court and under conflicting testimony. The jury returned a verdict against the plaintiffs, and in doing so necessarily found, not only that appellants are not the real owners of the property, but also that the Gulfport & Mississippi Coast Traction Company is the real, true owner.

The real substance of the litigation in both the replevin suit and in the present action has, then, been adjudicated. Unless the trial court committed error in submitting to the jury this issue of ownership, voluntarily tendered by appellants, it follows that the case should be affirmed. The only error discussed in the opinion heretofore rendered, or seriously considered by the court, is the alleged error in refusing to give appellants a peremptory instruction. The grant of this instruction would make the replevin bond determinative of ownership. It cannot be that the execution of a bond in replevin by one of the defendants confers title to personal property. In addition to the various methods known to the law whereby title to personal property may be conferred, appellants would now have

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us add the additional method of acquiring title by judicial bond. The bond does not confer title, but at most the mere right of temporary possession. The bond executed by appellants was in favor of the plaintiff in replevin, and so far as this record discloses the codefendant, the Louisville & Nashville Railroad Company, did not have an opportunity to give bond, and was not consulted by Abasi Bros. when the latter elected to give bond.

A word as to the proof in this case would not be amiss. It might be inferred, from what has been said in the first opinion, that the proof of ownership by the Gulfport & Mississippi Coast Traction Company is weak. But the record abundantly shows that this traction Company operated an electric lighting system from Ocean Springs along the beach through the city of Gulfport to Pass Christian, a distance of some thirty-five miles. In transmitting the current the company makes use of a large aluminum wire consisting of seven smaller wires twisted together. It also used an abundant supply of copper wire for transmitting the current from the main line along the service lines into the homes and places of business. The proof tends to show that there were various kinds and sizes of this copper wire, from one-half inch trolley wire to a much smaller service wire. There was also what is referred to as "tie" wires, of lengths suitable for the purpose for which they are used, and that these tie wires and line wires had marks indicating the use to which they had been put, and by which the representative of the Traction Company was enabled to identify them.

The proof tends to show that many miles of the single aluminum wire, made up of the seven small wires twisted together, as also a large amount of copper wire, had been stolen from the Traction Company. Appellees' evidence tended to prove that this aluminum wire amounted to six-thousand pounds, worth from twenty-five to sixty cents a pound, and the copper wire amounted to not less

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than five thousand nine hundred pounds, worth from eighteen to twenty cents a pound; that a tropical storm of great violence struck the coast in September, 1915, and blew down a large part of the line of wires of the Traction Company; that thereafter much of this property disappeared, and there was strong suspicion of theft. It appears, further, that appellants are extensive junk dealers engaged in the business of buying and shipping various junk, and the defense relied upon by appellees is that the property in question was stolen property and the purchase of this property by appellants, even without knowledge of the theft would not convey title to them. The chief witness for appellees is one Gorenflo, who constructed the electric lighting system for the Traction Company, and who supervised the lines to such extent that he was familiar with the wires in question. This witness positively identified the property as the property of the Traction Company. It may be conceded that there was no sufficient showing that appellants were themselves guilty of theft, but the proof does clearly show that the Traction Company lost large quantities of wire, and consequently the fact is well proven that some one took possession of this wire without authority of law.

The law is well settled that, if a shipper of property is not the real owner, the carrier may upon demand turn the property over to the true owner and defeat the shipper's claim or suit for failure to deliver by an affirmative showing that it had turned the goods over to the true owner. This was the holding of the supreme court of the United States in *Henry Hentz* v. *Steamship Idaho*, 93 U. S. (3 Otto) 575, 23 L. Ed. 978. In that case the court, among other things, says:

"When the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defense against the claim of the bailor. The decisions are numerous to this effect. *King* v. *Richards*, 6 Wharton [Pa.] 418 [37 Am. Dec. 420];

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Bates v. *Stanton*, 1 Duer. [8 N. Y. Super. Ct.] 79; *Hardman* v. *Willcock*, 9 Bing. 382; *Biddle* v. *Bond*, 6 Best & S. 225, If it be said that, by accepting the bailment the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, that this is assuming what cannot be conceded. Undoubtedly, the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed—to restore it or to account for it. *Cheeseman* v. *Exall*, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. . . . Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that, in some cases, fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and, if he cannot withhold the

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possession from the true owner, one claiming under him cannot. The modern and best considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. . . . We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretense of ownership. But if he has performed his legal duty, by delivering the property to its true proprietor at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees."

In the case of *Thomas* v. *Northern Pac. Express Co.*, 73 Minn. 185, 75 N. W. 1120, it is said:

"That a common carrier delivered property in its hands for shipment on demand to a stranger to the shipment, who was the rightful owner, and entitled to the possession thereof, is a good defense against the claim of the bailor for failure to redeliver."

Presumptively the bailor or shipper is entitled to the property as against the carrier, and the authorities hold also that the bailee cannot himself hold the property by setting up title in a third person. But this rule has no application when the carrier yields to the paramount claim or title of the true owner. In electing to turn over the property to the true owner, appellee Louisville &

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Nashville Railroad Company assumed the burden of proving that the Gulfport & Mississippi Coast Traction Company owned the property at the time of the delivery. This burden appellee, by the verdict of the jury, has met. In the case of *Wolfe* v. *Missouri Pac. R. R. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, the court says:

"Undoubtedly a carrier, in some circumstances, may deliver to the true owner, instead of to him who gave them into his charge for carriage. Its contract . . . is to carry and deliver, . . . or to account for the goods. It would be a lawful accounting to show that they had been delivered to the real owner upon his demand. This principle is now so well established in the law that the very statement of it will suffice for the purposes of this case. . . . But to justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery."

See, also, as to the general obligation of the carrier in this connection, the following cases: *Young* v. *Alabama R. R. Co.*, 80 Ala. 100; *Western Transportation Co.* v. *Barber*, 56 N. Y. 544; *Rosenfield* v. *Express Co.*, 1 Woods, 131, Fed. Cas. No. 12,060; *Shellenberg* v. *Fremont, E. & M. R. R. Co.*, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561; *Lavelle* v. *Belliu*, 121 Mo. App. 442, 97 S. W. 200; *King* v. *Richards*, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; *Wells* v. *Express Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; *Fitch* v. *Newberry*, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; note to *Kohn* v. *Richmond, etc., R. R. Co.*, 34 Am. St. Rep. 726; Note to *Jensen* v. *Eagle Ore Co.*, 33 L. R. A. (N. S.) 681.

In this case the court properly placed the burden of proof on the carrier by the grant of the following instruction:

"The court instructs the jury for the plaintiffs that the burden of proof in this case is on the defendant, the

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Louisville & Nashville Railroad Company, to show by a preponderance of the evidence that the property in question belonged and was the property of the Gulfport & Mississippi Coast Traction Company, and if the Louisville & Nashville Railroad Company fails to do this, then the jury shall find for Abasi Bros."

As stated, the execution of the bond by appellants did not operate to transfer property or convey title. It is always contemplated by this statutory bond that the property should be held temporarily by the principal in the bond to abide the judgment of the court. The present action is not a suit for damages for withholding possession, but the action is bottomed upon the alleged right of ownership in appellants. The issue in the present action finally narrowed down to the one issue of ownership as between the appellant and the Gulfport & Mississippi Coast Traction Company. This issue was voluntarily tendered by appellants themselves. The court is here called upon to deal with realities, and not mere appearances. Upon the issue of ownership appellants have lost. They cannot now be heard to speculate about an effort hereafter to fix liability against them on the bond. The obligee in that bond is the very party to whom the property has been delivered by appellee.

No other assignment merits discussion. The suggestion of error is accordingly sustained, and the judgment of the circuit court affirmed.

Affirmed.

ETHRIDGE, J. (dissenting).

I can neither accept the conclusions nor the reasoning of the majority opinion in this case, for, in my opinion, this decision becomes a precedent without a parallel, vicious in principle and injurious in practice—a precedent which enables the common carriers of the country to ride booted and spurred over the rights of the shippers and to treat with contumacy the courts of the

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country and to defile justice in her own temple. I challenge the soundness of the decision of the majortiy in this case and shall to the best of my ability meet precedent with precedent, argument with argument, and reason with reason, in the hope that I may enlist the good offices of the members of the bar and the legislature in undoing the mischief that will inevitably flow from this unfortunate decision. The decision in this case goes much further than any of decisions cited in the opinion as the authority for it, and authorizes a carrier to deliver goods to a claimant, who at the time of the delivery had no right of possession, which none of the cases cited does, and, in addition to this, permits collusion between the carrier and the claimant in the institution of a suit, for the purpose of getting the property from the carrier, and permits the claimant in such suit to invoke the aid of the courts, and then to contemptuously disregard the mandate of the law and the commands of its officers. I think every legal conclusion announced in the former report of this case (75 So. 756) is sound, and the facts stated in the opinion at that time were more than favorable to the appellee as to its conduct in this matter.

In brief, the facts of this case are that the appellants, Abasi Bros., were engaged in the business of buying junk in Gulfport, Miss., and as such dealers bought platinum and copper wire in small quantities, zinc, lead, scrap iron, and other waste materials at various dates from sundry persons, keeping a list, as required by law, of the names of the sellers, as given to them by such sellers. It collected about eighteen barrels of this junk and tendered it to the Louisville & Nashville Railroad Company for shipment to Buffalo, New York, taking the usual bill of lading. The goods were shipped out, but "somewhere in the United States" between Gulfport and Buffalo the goods were held up and returned to Gulfport under some kind of an agreement between the Louisville & Nashville Railroad Company and W. T.

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Stewart, general manager of the Gulf & Ship Island Railroad and also vice president of the Gulfport & Mississippi Coast Traction Company. When the junk was returned to Gulfport, it was consigned to W. T. Stewart, individually; but the agent of the Louisville & Nashville Railroad testified that he understood that it was consigned to Stewart in his capacity as general manager of the Gulf & Ship Island Railroad Company. The Gulfport & Mississippi Coast Traction Company, through its manager, sued out a writ of replevin in the circuit court of Harrison county, making the Louisville & Nashville Railroad, Abasi Bros., and W. T. Stewart parties defendant. The writ was issued to the sheriff of the county, who went to the depot of the Louisville & Nashville Railroad, took the property in possession, made an inventory and return of the property, and left the same in charge of the agent of the railroad company. Abasi Bros., consignors, made a replevin bond, as provided by statute, which was tendered to and accepted by the sheriff, and the sheriff thereupon phoned the agent of the Louisville & Nashville Railroad Company that Abasi Bros., had given the bond and would be down the following morning to get the junk and to deliver it to them. After getting this notice from the sheriff, the agent of the Louisville & Nashville Railroad delivered the goods to W. T. Stewart, testifying that he understood that Stewart was acting on behalf of the Gulf & Ship Island Railroad. The goods were receipted for in the name of W. T. Stewart by two employees of the Gulfport & Mississippi Coast Traction Company, who represented that they had authority from Stewart to sign the receipt and take the goods; the agent of the Louisville & Nashville Railroad testifying that he did not know that these employees were employed by the Gulfport & Mississippi Coast Traction Company. A member of the firm of Abasi Bros., went to the depot the following morning for the goods, but says that the agent of the railroad told him he did not know what became of the goods; but they later found that the railroad receipt

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showed delivery to the Gulf & Ship Island Railroad Company. Suit in trover was instituted by Abasi Bros. against the Gulf & Ship Island Railroad Company and the Louisville & Nashville Railroad Company.

There is no pretense in the record that either the Gulf & Ship Island Railroad Company or W. T. Stewart had any right, title, or interest in this junk. It appears, however, that Stewart, or the agent of the Traction Company took this property delivered to them by the Louisville & Nashville and delivered some of it to the Gulfport & Mississippi Coast Traction Company, some of it to the Telephone Company, and some of it to the Great Southern Hotel Company. It appears in testimony that the superintendent of the Louisville & Nashville, through an arrangement with Stewart and the manager of the Traction Company, with knowledge of the fact that the appellants had given bond and with knowledge of the fact that Stewart and the Louisville & Nashville were defendants in the suit of replevin, and that the Gulfport & Mississippi Coast Traction Company was plaintiff in such suit, and in violation of the directions of the sheriff, turned this property over to Stewart, who made the disposition above mentioned. In the suit for trover the Louisville and the Louisville & Nashville were defendants in the suit of replevin, and that the Gulfport & Mississippi Coast Traction Company was plaintiff in such suit, and in violation of the directions of the sheriff, turned this property over to Stewart, who made the disposition above mentioned. In the suit for trover the Louisville & Nashville defended on the theory that the property was the property of the Gulfport & Mississippi Coast Traction Company, and that it was not liable. It made no pretense to any right in itself to the property, but the testimony shows conclusively that its possession was that of bailee for the appellans, Abasi Bros. On the trial of the trover suit, from which this appeal is taken, the manager of the Traction Company, to show title, testified that the wires of the Traction Company along the coast for a distance

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of thirty-five miles were blown down and the wire stolen, and that the platinum wire was of the kind that was used on the poles, and that no other company on the coast used such wire. He testified, further, that the kind of copper wire involved in this suit was used by his company, by the company at Pascagoula, Hattiesburg, Bay St. Louis, and Jackson. There was no direct proof that any of the persons who sold to the appellants had stolen this wire, and there was no sufficient proof to prove ownership in the Traction Company of the property. So, then the appellants were the purchasers of the junk in question, having paid value for it, with no knowledge of its being stolen, so far as the proof shows. They were in possession through their bailee, the Louisville & Nashville Railroad Company, of the property, and were entitled to the possession until at least the case was decided in the replevin suit.

Section 4222 of the Code of 1906 reads as follows:

"Property Restored to Defendant on Bond.—If the defendant shall, within two days from the seizure of the property, or at any time afterwards, and while it is in the possession of the officer, enter into bond with sufficient sureties, to be approved by the officer, payable to the plaintiff, in double the value of the property, conditioned that it shall be forthcoming to satisfy the judgment of the court, the property shall be restored to him."

Section 4233 of the Code provides that on the trial of a replevin suit, where the defendant has given bond, and the plaintiff prevails in the suit, the judgment shall be that the defendant and the sureties on his bond restore the property to the plaintiff, if to be had, or pay him the value thereof, or of his interest therein, as assessed by the verdict of the jury. The section in full reads as follows:

"Judgment for Plaintiff.— If the plaintiff recover and the defendant has given bond for the property, the judgment shall be against the defendant and the sureties on his bond, that they restore the property to the plain-

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tiff, if to be had, or pay him the value thereof or of his interest therein, if a limited one, as assessed by the verdict of the jury, and that they pay to the plaintiff such damages as shall have been assessed by the jury for the wrongful taking and detention, or for the wrongful detention thereof; but if the plaintiff has given bond for the property, the judgment shall be that he retain it, and that he recover of the defendant the damages assessed for the wrongful taking and detention, or wrongful detention, as the case may be. If the plaintiff recover judgment by default, he may have a writ of inquiry to assess the value of the property or the damages for the wrongful taking and detention, or wrongful detention, or both, as the case may be; and judgement shall be rendered therein as upon an issue found for him."

The supreme court, in construing this statute in the case of *Bond* v. *Griffin,* 74 Miss. 599, 22 So. 187, held that under this section the judgment should be in the alternative for the property or its value as found by the jury, and that the defendant in such case can elect to pay the value and retain the property, reversing the judgment in that case, which merely provided for the return of the property without assessing the value thereof. So, under this statute, the appellants had the right of possession until the lawsuit was decided, and then, if decided against them, had the right to pay such value as the jury assessed as being the value of the property and keep the property. It is clear, then, that the property was the property of the appellants at the time the Louisville & Nashville turned it over to Stewart, subject only to the restriction that, if the judgment in the replevin suit went against Abasi Bros., they should pay its value to the plaintiff as assessed by the jury. It is well settled that possession or a qualified right is sufficient to enable a party to maintain tresspass or trover against any one except the real owner. 38 Cyc. 2044; *Harris* v. *Newman,* 5 How. 654; 28 Amer. & Eng. Encl. of Law, 674 and 675; *Heard* v. *James,* 49 Miss. 236; *Al-*

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liance Trust Co. v. *Nettleton Hardwood Co.*, 74 Miss. 584, 21 So. 396, 36 L. R. A. 155, 60 Am. St. Rep. 531; *Barker* v. *Lewis Storage & Transfer Co.*, 79 Conn. 342, 65 Atl. 143, 118 Am. St. Rep. 141. It is clear, therefore, that the appellants had a right to institute conversion against the Louisville & Nashville Railroad under the facts in this case.

Appellees cite the case note to *Jensen* v. *Eagle Ore Co.*, 33 L. R. A. (N. S.) 681, for authority for the position that the judgment should be affirmed. In this case I quote from the headnote as follows: "A bailee cannot relieve himself from the duty of redelivering the property to the bailor, by showing that at some unknown time it had been stolen by an unknown thief from an undisclosed owner, and that the bailor by reasonable inquiry could have ascertained that fact, and that the bailee had purchased the property from one claiming to be the agent of such owner."

Taking the authorities in this case, and in the case note appended thereto, and comparing them carefully with the present case, will show that none of the authorities sustain the position of the court, for in none of them has it appeared that the true owner was not entitled to the possession at the time of the delivery, and none of them holds that a carrier can connive with an alleged owner, and defend its failure to deliver where such connivance appears. On the contrary, all the authorities that I have seen that treat of the matter hold that the alleged true owner must have the right of immediate possession, and all of them hold (that deal with this matter) that, wherever the carrier has connived with the claimant, it could not defend its delivery under such facts. The act of the carrier must always be in good faith, and without fraud or connivance. At page 687 of the L. R. A. report (33 L. R. A. [N. S.], *supra*) the following is laid down:

"It constitutes a wrongful conversion of the bailed property for the bailee to surrender it to, or permit a third person to obtain possession of it, where such per-

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son is not the true owner. And it is no defense to the bailee, in an action against him by the bailor for such wrongful conversion, that the title to the bailee property at the time of the bailment was in fact in another" — citing *Estes* v. *Boothe,* 20 Ark. 583; *Riddle* v. *Blair,* 163 Ala. 314, 51 So. 14; *Roberts* v. *Stuyvesant Safe Deposit Co.,* 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am St. Rep. 718.

Again (33 L. R.A.[N. S.] on page 695), the following is laid down, which is applicable to this case, to wit:

"A bailee cannot hunt up a paramount claimant, and then, when called upon by the bailor for the property, answer that he is a bailee of such claimant. Thus a husband, who becomes the bailee of property, cannot defend an action by the bailor, on the ground that his wife is the true owner of the property and has asserted a claim thereto, and that he is holding the same for her, and he having knowledge of the wife's interest in the property at the time of the contract of bailment." *Pulliam* v. *Burlingame,* 81 Mo. 111, 51 Am. Rep. 229. See, also, *Shelbury* v. *Scotsford,* Yelv. 23; *Marvin* v. *Ellwood,* 11 Paige, 365.

Again, under the heading "Where the Bailee Instigates Commencement of Action by Adverse Claimant," I quote the following from said note:

"In order that the bailee of property be entitled to show the seizure thereof upon legal process as a defense to an action by the bailor, the seizure must not have been brought about by any fraud or connivance of the bailee" —citing *The M. M. Chase* (D. C.) 37 Fed. 708. See, also, *Walter Wood Harvester Co.* v. *Dobry,* 59 Neb. 590, 81 N. W. 611.

In the case of *Stiles* v. *Davis,* 1 Black, 101, 17 L. Ed. 33, from the opinion I quote as follows:

"After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the

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goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment."

The case of *Hentz* v. *Steamship Co.*, 93 U. S. 575, 23 L. Ed. 978, cited in the majority opinion as sustaining their position, distinctly recognized the fact that the alleged true owner must have the right of immediate possession. On page 979 of the Lawyers' Edition I quote from the opinion as follows: "And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defense against the claim of the bailor."

The decisions are numerous to this effect. In the case of *Wolfe* v. *Missouri Pac. R. R. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, cited also in the majority opinion, I quote from the syllabus as follows:

"Common Carrier— Delivery.—To justify delivery to the true owner contrary to or without the shipper's orders the carrier has the burden of proving the ownership and immediate right of possession in the person to whom such delivery is made."

This case also holds that conversion lies against the carrier for a wrongful delivery of the goods. It also holds that, when a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business then carrie on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible. In the present case the agent of the Louisville & Nashville admits that the sheriff gave it notice that the appellants had given the replevin bond and were entitled to the property.

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The majority also cite the case of *Kohn* v. *Richmond & Danville R. R. Co.*, 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726, or rather cite the case note appended to this case. The case itself holds that the carrier cannot deliver goods consigned to it for transportation to one claiming to be the true owner, unless such claimant shall accompany such demand by legal process. There are numerous authorities that support the South Carolina court in this proposition, though the greater number of courts that have passed upon the question have decided that the carrier could, at its peril, deliver to the true owner where the true owner had both the title and the right of immediate possession. This proposition has not heretofore been decided by the courts of Mississippi. It would seem that the better reasoning is with the South Carolina doctrine, requiring some kind of legal process before the carrier would be justified in turning over property consigned to it for transportation. This is especially true, when we consider the importance to the business world of having goods promptly shipped and speedily delivered to the consignee. In many cases a man's business would be destroyed if he should fail to receive consignments shipped to him, necessary for carrying on his business or supplying his trade. There is nothing unreasonable in requiring the person claiming goods in the custody of the common carrier to resort to legal process. Such step protects all interests and seems would do no harm to any one. It may be true that in special cases that hardship would result in requiring legal process where there might be some difficulty in obtaining it. The doctrine that the carrier can deliver without legal process had its origin in that state that is described in the phrase that "hard cases make bad precedents."

I would not dissent, however, from my Brethren, if the decision involved here was on facts analogous to the cases which they cite to sustain their contention.

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But I do insist that, before a carrier is authorized to deliver goods in its possession to a party claiming them, the claimant must not only have legal title, but must have the right of immediate possession. There is no case anywhere, so far as I know and so far as has been pointed out to us, that holds that a party who has invoked the aid of the court to assist him in securing his rights can disregard the right created and recognized by the law which he invokes.

In the next place, the evidence does not warrant the verdict for the Louisville & Nashville even under its theory of the case because there is a failure to prove that the title was in the party to whom the delivery was made, or to the party who, it is claimed, is now in possession—the Traction Company. The most that the Traction Company proved is that it used wire of the exact kind that a portion of the wire in this suit was, and that, so far as its managers knew, there was no other company south of Atlanta that used such wire. The majority opinion says the witness positively identified the wire. It is true the witness makes a general statement, but it appears from the witness' testimony that the wire of the kind he uses is used commercially, and that they are not the sole owners or patentees of any such wire. When he states that there is no such wire used south of Atlanta, manifestly he is attempting to bridge a gap by recklessly swearing what in the very nature of things, he could not know as a definite fact. I concede that he was a willing witness, but Gulfport is a port to which numerous vessels from all parts of the world come, and it appears in testimony that at least some of this wire was bought from seagoing vessels. The court knows judicially that there are many cities in the world, and reasonably close to Gulfport, using such wires as used by traction companies, and that scrap and waste wire of this kind is bought and sold in the markets. The fact that the Traction Company had wire stolen

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from it does not even tend to prove that the wire in suit was a part of such wire, and, in addition to this, a portion of the goods delivered to Stewart was turned over to the Great Southern Hotel Company, and there is absolutely no proof in the record that such company was the owner of such wire; the only proof being tendered was a court proceeding which the trial judge excluded rightfully. There is no proof whatever that the material turned over to the Telephone Company belonged to the Telephone Company, nor is there any proof of its character, nature, and value. One witness for the Railroad Company tried to testify that he knew of no such persons as some of the people named in the list of sellers kept by the junk dealer, but when this witness was put to the test he could not give the names of many persons called to his attention on cross-examination, many of whom were engaged in business in Gulfport. Giving to the testimony introduced by the Railroad Company, all that could possibly be inferred from it under legal rules, the greatest credulity of the logical mind could not be satisfied from this proof of the ownership of this property, or that it was stolen from the Traction Company.

The court instructed for the defendant as follows:

"The court instructs the jury that after the sheriff released his levy he had no further right to control the action of the Louisville & Nashville Railroad Company in reference to the wire, and if he did undertake to do so the Louisville & Nashville Railroad Company had a perfect right to disregard any instruction which he gave in reference to the further disposition of the wire."

This instruction is fatally erroneous. The sheriff had levied upon the goods, and defendant in the replevin suit had given bond, and it was the sheriff's duty to turn the property over to Abasi Bros. under this bond. It was then the power and was the duty of the sheriff to retake this property, after taking bond for it, and deliver it to the appellants. The Louisville & Nashville had no

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right to disregard the sheriff's instructions. The propertywas in the custody of the sheriff, in legal contemplation, until it was actually delivered to the appellant.

Again, the court instructed the jury generally that, if the property in question was the property of the Gulfport & Mississippi Coast Traction Company, then the Louisville & Nashville Railroad Company had a right to turn it over to the Traction Company, regardless of any instructions from the sheriff. This instruction is erroneous for two reasons: First, it does not embrace the hypothesis that the Traction Company must be entitled to its immediate possession, and, under the law, it is conceded that the right of possession was with the appellant. In the second place, the property was in *custodia legis* until it was delivered to Abasi Bros., and the Railroad Company had no right to disregard this fact. In addition to this, the property was not delivered by the Louisville & Nashville to the Traction Company, but to W. T. Stewart, and the instruction assumes as a fact that it was delivered to the Traction Company, and was misleading for this reason.

The majority opinion says:

"Abasi Bros., then, did not seek an order of the circuit court having jurisdiction of the replevin in aid of their right of possession under the bond."

If, by this language the majority means that the appellants were limited to seeking the aid of the circuit court in having possession restored to them under the bond, I do not agree with them; because in law there is such a thing as an election of remedies, and the appellants had a perfect right to sue in trover, instead of trying to hunt up this property taken from them unlawfully. If the majority mean by this language that a contempt proceeding should have been taken against the agents of the Louisville & Nashville and Stewart and the agents of the Traction Company, I heartily agree with them, because I think the process of the court should have been protected by contempt proceedings,

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and these parties should have had the benefit of the "refining influences of the county jail" until they were taught that even powerful corporations have no right to trifle with the rights of the humblest citizen and the process of the court. But jail sentences, like harsh words, "butter no parsnips," and, while it might have been highly satisfactory to the appellants to have seen the circuit court protect its process, they were vitally interested in getting value for their property.

Again, the majority opinion says:

"The real substance of the litigation in both the replevin suit and in the present action has, then, been adjudicated. Unless the trial court committed error in submitting to the jury this issue of ownership, voluntarily tendered by appellants, it follows that the case should be affirmed."

It is difficult for me to comprehend the legal reasoning that prompts my Brethren to make this announcement. The party in the replevin suit was not a party to this suit. Neither was there any issue between the parties in this suit in the replevin suit. I cannot see how the issue between the appellants and the Traction Company in the replevin suit is adjudicated in a suit to which the Traction Company is not a party. Again, I cannot see how the issues in this suit can affect the issues in the other suit, when there was no issue in the other suit between the parties to this suit. I have always understood that to constitute *res adjudicata* there must not only be the same issues, but the issues must be between the same parties. *Creegan* v. *Hyman,* 93 Miss. 481, 46 So. 952; 24 Amer. & Eng. Enc. of L. 778; 9 Enc. of Pl. & Pr. 622, 626.

Again, the court, speaking of the former opinion, holding that the peremptory instruction should have been granted to the appellants, says:

"The grant of this instruction would make the replevin bond determinative of ownership. It cannot be that

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the execution of a bond in replevin by one of the defendants confers title to personal property. In addition to the various methods known to the law whereby title to personal property may be conferred, appellants would now have us add the additional method of acquiring title by judicial bond. The bond does not confer title, but at most the mere right of temporary possession."

The plaintiff in the suit below had acquired this property by purchase. It was in his possession, and possession is satisfactory title to maintain a suit against any one who has no superior title to possession. The possession being in Abasi Bros., and the execution of the bond retaining the possession and giving, in addition, to them the additional right to pay the value of the property, makes the title perfect. It is a recognition and the confirmation of the possessory title already possessed by the appellants, through their bailee, the Railroad Company.

In conclusion, I desire to say that practically all the authorities cited with elaboration in the opinion were before the court when the former opinion was rendered. The only thing that I can see that prompts the court to change its opinion is the suggestion pressed upon us that the goods were stolen goods and that the appellants were buyers of stolen property. In my opinion, the record does not sufficiently prove that this is true, and we ought not to let a charge of misconduct or of bad character prejudice a litigant's right in the absence of sufficient proof. In *Hampton* v. *State*, 88 Miss. 257, 40 So. 545, 117 Am. St. Rep. 740, this court said:

"Mulattoes, negroes, Maylays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing."

I wish the court had added, "Railroads, traction companies, and junk dealers." Has the court thrown down its lofty ideals of the equality of the litigants?

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COOK, P J. (dissenting).

It seems quite clear to me that Brother ETHRIDGE has about sized up the law applicable to the original replevin suit, and the court would no doubt require the Gulfport & Mississippi Traction Company to deliver the property to Abasi Bros. before the beginning of the trial, and in default thereof a judgment would be entered for Abasi Bros. The Traction Company invoked the aid of the court to determine its alleged right to the possession of the property in question, and immediately ignored the statute it had invoked. Abasi Bros. thereupon filed the present suit for conversion, and it seems to me that the Railroad Company should not be permitted to defend upon the theory that the Traction Company was the owner of the property. The Traction Company violated the law it had invoked, and it is my judgment that they had no standing in a court of law. The fact that it gained possession by fraud foreclosed its defense to this suit.

It is also apparent to me that, under the facts appearing of record in this case, the Traction Company was not entitled to the immediate possession of the property, because the statute expressly required that the property should be restored to Abasi Bros. when its bond had been approved by the officer executing the writ of replevin. In other words, by its terms the statute gave Abasi Bros. the right to the immediate possession of the property, and this right cannot be defeated by evidence showing that the traction Company was the true owner of the property. If, upon a proper trial of the replevin suit, it should appear that the property was the property of the Traction Company, then the right of possession would yield to the title; but that issue is not and cannot be involved in this suit, without a repeal of the statutes on replevin.

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STATE v. FETTERMAN.

[76 South. 673, Division A.]

FALSE PRETENSES. *Property subject to lien. Statute.*

Under Code 1906, section 1168, providing that if any person shall sell any property on which he knows there is a lien without informing the person to whom he sells, etc., of the existence of the lien, he shall be guilty of obtaining under false pretenses, whatever he receives from the person dealing with him. An indictment charging that defendant unlawfully, and feloniously sold property on which there was a valid lien, without informing the purchaser of its existence defendant then and there well knowing the existence of the lien and that defendant did in that manner obtain fifteen thousand dollars of property of the purchaser, was a sufficient indictment under the statute.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, Judge.

John Leet Fetterman was indicted for disposing of property subject to a lien, without informing the buyer of the existence of the lien. A demurrer was sustained to the indictment and the state appeals.

The indictment in this case alleges that:

The defendant "unlawfully, willfully, and feloniously did sell to the Fetterman Bowl & Column Manufacturing Company . . . the following real and personal property [describing it], on which there was then and there a valid and existing lien held by Mrs. Viola D. Fetterman, without then and there or at any time prior thereto informing the said Fetterman Bowl & Column Manufacturing Company of the existence of said lien and of the exact state of the title of the above-named property described as aforesaid, as affected thereby, he, the said John Leet Fetterman, then and there well knowing of the existence of said lien, and did then and there, in the manner aforesaid, obtain of and from it, the said Fetterman Bowl & Column Manufacturing

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Company, the sum of fifteen thousand dollars of the value of fifteen thousand dollars, good and lawful money of the United States of America, of the property of the said Fetterman Bowl & Column Manufacturing Company."

To this indictment the defendant demurred upon the following grounds, to wit: "First, because the said indictment fails to allege that the money was received by means of the sale to the said Fetterman Bowl & Column Manufacturing Company; second, because the said indictment fails to allege that the said money was received by color and means of said false pretense; third, because the said indictment fails to allege that the defendant obtained the money 'feloniously'; fourth, because the said indictment does not charge defendant with the felonious intent to cheat and defraud the Fetterman Bowl & Column Manufacturing Company; fifth, because the said indictment does not allege that the Fetterman Bowl & Column Manufacturing Company was induced to pay the money by reason of the false pretense; sixth, because the said indictment does not describe the lien which was existing on the property at the time of the sale, does not state whether it was a lien by contract or by law, and does not attempt to describe the lien in any way."

Earl Floyd, for the state.

The indictment is drawn almost in the language of section 1168 of the Code of 1906, and charges the appellee with selling a piece of real property, on which there were located houses and machinery, to the Fetterman, Bowl & Column Manufacturing Company without informing the said vendee of the existence of a lien on such property in favor of Mrs. Viola D. Fetterman.

The demurrer contains several grounds upon which the invalidity of the indictment was urged in the court below but it is obvious that the trial court did not

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have before it the recent case of *State* v. *Mitchell,* 67 So. 853, decided by this court on March 22, 1915, when it sustained the demurrer in the case at bar.

In the *Mitchell Case, supra,* an indictment in practically the same words as in the case at bar was sustained by this court when it reversed the judgment on the demurrer given by the trial court. Without setting out the indictment in the Mitchell Case, as found in the opinion of the court, I respectfull ask this court to compare the indictments. In addition to the similarity in the indictments, the court will observe that the grounds of demurrer are likewise practically similar, the only difference being that in the instant case, it is alleged in the sixth ground that the nature of the lien was not sufficiently described. It is manifest that this contention is without merit inasmuch as it is specifically alleged that the prior existing lien was in favor of Mrs. Viola D. Fetterman. It is therefore unnecessary to describe at length the lien or to show whether it was a lien arising out of contract, or of law as section 1168 makes the penalty the same irrespective of the nature of the lien. The only requirement is, that the lien be sufficiently described to apprise the defendant of the nature of the accusation in order that he may make his defense and be protected against a second prosecution, and it is manifest that these requirements have been met in an ample way.

This indictment is based on a statutory offense, and having followed the words of the statute it is sufficient. *Richberger* v. *State,* 44 So. 772.

I therefore respectfully submit that the judgment of the trial court should be reversed and the cause remanded.

SMITH, C. J., delivered the opinion of the court.

There is no merit in any of the grounds of the demurrer. Section 1168, Code of 1906; *State* v. *Mitchell,* 109 Miss. 91, 67 So. 853.

Reversed and remanded.

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CITY OF GRENADA v. GRENADA COUNTY.

[76 South. 682, Division A.]

1. COUNTIES. *Liability. Statute.*

Counties are political subdivisions of the state and as such are immune from liability to the same extent that the state is. There can be no liability against either the state or a county unless it be expressly or impliedly created by statute.

2. MUNICIPAL CORPORATIONS. *Paving county property. Liability. Statute.*

Under Laws 1912, chapter 260, section 4, relating to paving, a municipal corporation has no legal right to impose liability upon a county or the court house property of the county for paving the street in front of it as the act in question gives no such authority in law.

3. MUNICIPAL CORPORATIONS. *Paving. Manner of collecting assessments.*

Taking sections 23 and 25, Acts 1912, chapter 260, and reading them together, the court construed them to mean, that where the paving improvement had been made by the city, in a regular and lawful manner, and the property-owner in front of whose property the improvement had been made refused to pay for same, suit may be filed in the chancery court to enforce the lien against the property, and in that manner collect the amount expended by the city for the improvement. But under section 25 of the act it is provided that no personal judgment shall be rendered against the property-owner, but that the extent of the judgment shall only be to condemn and sell the property improved for the purpose of paying the tax assessed against it.

4. COUNTIES. *Liability of county property for debt.*

The public property of a county used in the orderly administration of governmental functions in and for the public interest cannot be levied upon and sold under execution, nor can a lien for a debt against it be enforced by foreclosure and sale, as such procedure would be against public policy and would hinder and impair the administration of the governmental functions of the state and county.

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APPEAL from the circuit court of Grenada county.

HON. H. H. RODGERS, Judge.

Proceedings by the City of Grenada to recover for paving from the County of Grenada. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. M. Mitchell, for appellant.

Chapter 260, Acts of 1912, does not apply to county property. Section 4 of said act exempts from its provisions property belonging to the state, and hence, as a necessary corrolary, property belonging to the counties also; since our court has repeatedly held that counties are merely subdivisions of the state and boards of supervisors and public school trustees are merely agencies created by the state to enable it to conveniently discharge a governmental function.

Railroad Co. v. *Middleton,* 109 Miss. 211. Again section 25 of said act provides that no personal judgment can be rendered against the owner of property under this act but that the extent of the judgment shall only be to condemn the property improved to be sold for the purpose of paying the tax assessed against it. See section 25, chapter 260, Acts of 1912.

I do not think counsel for appellee will for a moment contend that the City of Grenada could obtain a judgment or decree condemning county property to be sold to pay said assessment, even if the act had provided for redemption as required by section 79 of the Constitution, as that would be against public policy as tending to block the orderly administration of governmental functions.

Hence it is clear that the terms of the act itself excludes from its operation county property, as well as state property, if there is any difference in the two expressions.

But even if the act did not exclude county property from its provisions in so many words, yet, it has been

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repeatedly held by our court that neither state nor counties are supposed to be included in any statute imposing burdens unless specially named or fairly embraced in the language used therein. *Board of Supervisors of Warren Co.* v. *Klein,* 51 Miss. 816; *Branham* v. *Supervisors,* 54 Miss. 236; *Panola Co.* v. *Gillon,* 59 Miss. 198; *Redditt* v. *Wall,* 55 So. 45.

I submit that the only way in which the county could have been bound for the payment of the costs of paving in front of its property was for the city authorities to have requested the board of supervisors to join with the city in letting the contracts for this paving in front of its property; since the statute, sections 361, 362, and 363, Code of 1906, provides the only method by which the county could legally authorize or pay for contract work where the amount exceeded fifty dollars. This the city failed to do but contented itself with following the formal provisions of said act, and not even taking the precaution of serving any personal notice of its intentions to do the paving or of the levy of this special assessment against the county, but simply gave the notices by publication provided for in said act, leaving the county authorities to find out as best they could what the city was doing in the matter, the first actual personal notice to the board of supervisors or other proper authority having been the filing of the claim against the county for the cost of said paving.

I submit therefore that there has not been and could not be any legal liability on the part of the county in this matter, and the learned circuit court erred in rendering judgment against it and this case should be reversed and suit dismissed by this court.

Cowles Horton, for appellee.

It is to be presumed that the legislature of 1912 was familiar with the case of *Macon* v. *Patty,* 57 Miss. 385, which had held that exemption from general taxes did

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not exempt from these special assessments; also with that line of authorities holding that exemption from state taxes did not exempt from county and levee taxes and *vice versa.* This being true, it was certainly plain that all property, not expressly exempted in the act except property of the United States, would be liable under its terms, and, with this knowledge in mind, it is erroneous to contend for an exemption which cannot be found in the act itself. The legislature, of course, may tax all property, except that of the Uinted States, but for reasons of its own has seen fit to exempt property belonging to these subdivisions. At the same time, since the public policy is not always the same in all cases (100 Miss. 338) it appears very clear to us that the purpose here was to make these subdivisions liable for its share of these special and beneficial improvements. Such a purpose, if it exists, is not at all peculiar to this state but is justified by the opinions of learned courts and writers.

Cooley says, in his work on Taxation, second edition, on page 653, that "even public property is often subject to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain."

Smith tells us: "While the state may not authorize corporate authorities to levy special assessments upon property of the United States, as it would be an invasion of the rights of a distinct sovereignty, no such reason exists as between the several agencies of the state government which are subject to its control, and a county may be compelled to pay a special assessment against its courthouse for local improvements, although public property be exempt from taxation by express statute." Mun. Corp., Sec. 1236, page 1245; See, also, 28 Cyc. 1117, Note 65.

The instant question has been decided in the case next herein cited, where the property involved was a

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courthouse in each instance, and, as these cases discuss the question very ably and exhaustively, I shall ask the court to read them. They are: *Adams County* v. *Quincy,* 22 N. E. 624; *Edwards* v. *Jasper County,* 94 Am. St. Rep. 301. Those cases answer every contention which might be made in opposition to the opinions of Cooley and Smith that such property should not be held to be exempt, and, without prolonging this brief by quotations from them, I shall urge upon the court to examine them carefully.

The rule for which we contend applies also in the state of Louisiana, as will be seen by reference to the case of *New Orleans* v. *Warner,* 175 U. S. 120, 44 L. Ed. The cases cited by counsel are not in point, and none of them hold anything contrary to the judgment appealed from. *Supervisors* v. *Klein,* 51 Miss. 816, merely held that county warrants did not bear interest under section 2279 of the Code of 1871. *Brahham* v. *Supervisors,* 56 Miss. 236, held that a county was not liable for defects, from which injury occurred in a bridge. *Panola Co.* v. *Gillon,* 59 Miss. 198, held that county property was not liable to a mechanics' lien and the provisions in the statutes in reference to third parties were not applicable where the county was the party sought to be proceeded against.

None of them dispute, in anywise, the rule laid down in the authorities we have cited. Of course we do not claim that the courthouse could be sold for this assessment any more than it could be sold under a builder's lien. At the same time, the county is still liable, we submit, in the case at bar just to the same extent and in the same manner as it would be to a contractor building the courthouse. While judgments against the county cannot be enforced in the same way as against individuals, still those judgments are, nevertheless, enforceable in another and equally as efficient manner.

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HOLDEN, J., delivered the opinion of the court.

The city of Grenada adopted chapter 260, Laws of 1912, and proceeded thereunder to pave a certain one of its streets upon which the county courthouse property of Grenada county abutted and fronted. The proper notice by publication was given to the property owners on the street proposed to be paved, and all other requirements of the act were regularly carried out and the improvement made. There was no personal notice served upon the county officials, nor was the board of supervisors requested or invited to join with the city in letting the contract for the paving of the street in front of and adjoining the said courthouse property, except by the publication of notice aforesaid. After the said paving improvements were made by the city in front of the county courthouse property, the city presented a claim to the board of supervisors of the county for the cost of one-third of the paving, which amounted to two hundred and fifty-three dollars. Upon the refusal of the board of supervisors to pay this claim, the city of Grenada appealed to the circuit court of said county, and there obtained a judgment, which may be said to be a personal judgment, against the county for said amount, and from this judgment the county appeals here.

The appellant, Grenada county, makes two contentions by its assignments of error which deserve notice and discussion:

First. Appellant contends that chapter 260, Acts of 1912, imposes no liability upon counties or the property owned and used by the county in the administration of its governmental functions; and that as a county has no liability except as authorized, expressly or by necessary implication, by statute, and the act here in question does not expressly or by necessary implication impose a liability upon the county, but on the contrary, that section 4 of said act provides that "the provisions

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of this act shall not apply to property owned by the state," and that as a county is a mere subdivision of the state, the exemption from the liability sought to be imposed in this case is clearly intended in the act.

Second. It is contended by appellant that even though the act in question does not exclude county property from its provisions, but includes it by necessary implication, still no recovery can be had in this case against the county because section 25 of said act provides that "no personal judgment shall be rendered against either a resident or nonresident owner, but the extent of the judgment shall only be to condemn the property improved to be sold for the purpose of paying the tax assessed against it."

As to the first contention of appellant, it is well settled that no suit can be maintained against a county to recover for liability unless such liability is authorized by some statute, expressly or by necessary implication. *Brabham* v. *Board of Supervisors,* 54 Miss. 363, 28 Am. Rep. 352; *Redditt* v. *Wall,* 55 So. 45, 34 L. R. A. (N. S.) 152; *Sutton* v. *Board,* 41 Miss. 236. We are of the opinion that such liability as claimed here is not embraced either expressly or by necessary implication in the act in question. The provisions of the act specifically exempting property owned by the state do not necessarily imply that the property of a county, which is a subdivision of a state, is not exempt, but is subject to liability for improvements made under the act the same as property of persons, as contended by appellee. We construe the language of the act as exempting the county property from the imposition of the burden, and we think that the intent of the act, expressed by the language therein, not only fails to include county property within its terms, but on the contrary intended to exempt it, the same as state property is exempt by the act and by the common law. Counties are political subdivisions of the state and as such are immune from liability to the same extent that the state is exempt. There can be no liability against

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either the state or a county unless it be expressly or impliedly created by statute. 7 R. C. L. 950. In this case the statute failed to create liability against the county, but expressly provided against such liability by declaring that "the provisions of this act shall not apply to property owned by the state," which inferentially includes as exempt also the property of a county of the state. Therefore, under chapter 260, acts of 1912, the city of Grenada had no legal right to impose liability upon the county or the courthouse property of the County, for paving the street in front of it, as the act in question gives no such authority in law.

The second contention of appellant is based entirely upon the interpretation of section 25, of said chapter 260, Acts of 1912, which is set out above. It will be observed that section 23 of the act provides that:

"If the assessment be not paid in thirty days it shall bear interest at the rate of ten per cent., and the mayor and board of aldermen may order suit to be brought in the chancery court to enforce the lien."

Taking the sections 23 and 25 and reading them together, we construe them to mean that where the paving improvement has been made by the city, in a regular and lawful manner, and the property owner in front of whose property the improvement has been made refuses to pay for such improvement, suit may be filed in the chancery court to enforce the lien against the property, and in that manner collect the amount expended by the city for the improvement. But under section 25 of the act it is provided that no personal judgment shall be rendered against the property owner, but that the exent of the judgment shall only be to condemn and sell the property improved for the purpose of paying the tax assessed against it.

It is a well-settled principle of law that the public property of a county used in the orderly administration of governmental functions in and for the public interest cannot be levied upon and sold under execution,

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nor can a lien for a debt against it be enforced by foreclosure and sale, as such procedure would be against public policy, and would hinder and impair the administration of the governmental functions of the state and county. The appellee, city of Grenada, having no right, under section 23 of the act, to enforce its lien in the chancery court against the county for the debt claimed, and as section 25 of said act provides that no personal judgment shall be rendered against the property owner, the county here, we are bound to conclude that, first, there is no liability imposed by the statute upon the county in this case for the improvements made in front of the county courthouse property, and, second, that if the statute authorized such liability on the part of the county it could not be enforced in the chancery court by foreclosing the lien and selling the property of the county, under section 23 of the act, and as, under section 25, no personal judgment can be rendered against the county owning the property, the lower court erred in this case in giving a personal judgment against the county of Grenada in favor of the appellee city of Grenada.

It appears that under the act public property belonging to the state or county cannot be subjected to liability for improvements made on the streets in front of such property, but that the act gives such right and remedy only against the property of persons and private corporations. The legislature in our judgment, failed to make provision in the act which would allow recovery against the county for such improvements, and whether or not the omission to do so was unintentional is a matter we are not here concerned with.

The judgment of the lower court is reversed, and judgment entered here.

Reversed and judgment here.

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ROBERTSON, REVENUE AGENT, v. FIRST NATIONAL BANK OF GREENWOOD.

[76 South. 689.]

1. TAXATION. *Equalization by board. Jurisdiction.*
When the board of supervisors is meeting for the equalization of taxes, it acts as a court of limited jurisdiction and all of the jurisdictional facts must appear upon the minutes of the board to render its proceedings valid.

2. TAXATION. *Equalization. Notice to taxpayers.*
Under section 6, chapter 98, Laws 1916, it is incumbent on the president of the board of supervisors to give five days' notice "by posting, at the court house or publishing in a newspaper of the county" of the special meeting at which action is to be taken for the equalization of taxes and where such notice was not given the board of supervisors was without jurisdiction to raise the assessment of defendant bank at that meeting or at a later meeting, also without notice, and their orders and proceedings were absolutely void.

APPEAL from the circuit court of Leflore county.

HON. F. E. EVERETT, JUDGE.

Suit by Stokes V. Robertson, revenue agent, against the First National Bank of Greenwood. From a, judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Monroe McClurg, for appellant.

Recurring again to the counsel's most persistently urged point that, the failure of the minutes of the board of supervisors at their October meeting to include a copy of the five days' notice published for the purpose to hold that special meeting is fatal to recovery in this cause, the reply, is as above stated, that special meeting was merely incidental in a matter of mere procedure. No final judgment was rendered at that meeting. Appellee had appeared and con-

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tested at the September meeting and was charged by the Act of 1916, with knowledge that the action of the September meeting was not to be considered final and a dismissal of appellee from his diligence. The failure of that clerical omission in the recorded minutes would have been more important if the matter of assessing or valuing the appellee's property had originated there, or the final judgment been rendered there, in a direct controversy between the state's taxing officers and the appellee alone, or in some contractual matter between them as in the case of *Rabb & Chichester* v. *Postal Tel. Co.*, 104 Miss. 165, and other cases cited by counsel. There was not a single jurisdictional act taken at that meeting of which the appellee could complain. No affirmative recital in the minutes would have helped or hurt the appellee other than what was done to its advantage.

To determine whether the process is sufficient, or even necessary the whole record must be examined; it is not enough to look to the return only; and the record as a whole will be given a sensible construction looking to the real ends of justice. See *Allen* v. *Dicken*, 63 Miss. 91, 93, especially on collateral attack of the judgment. See *Brennan* v. *Strass*, 85 Miss. 341, 344, and *Swain* v. *Gilder*, 61 Miss. 667, 670, as to what the rules are respecting affirmative showing of jurisdictional facts in the proceedings before courts of inferior jurisdiction.

Gwin & Mounger, for appellee.

The constitutional sufficiency of the notice under the Act of 1916, will be hereafter discussed. Here we submit that the question as to whether the notice required by that act is a sufficient compliance with the state and federal Constitution is immaterial. Regardless of the constitutionality or unconstitutionality of the law upon the point of notice and regardless of

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whether notice can be dispensed with altogether or not, it is, nevertheless, true that section 6 of the Act of 1916, requires that notice shall be given and specifically prescribes that the notice shall be given in one of two ways, and that the special meeting of the board of supervisors shall be held only "after giving five days' notice by posting at the courthouse or publishing in a newspaper of the county. "The third special plea herein expressly alleges that the notice was never given of the meeting, or of the intention of the board of supervisors to consider assessments, and the demurrer admits this to be a fact. The order of the board of supervisors and the subsequent proceedings based thereon are obviously void, even though the notice were not required by the Constitution and might have been dispensed with by the legislature. It was not dispensed with, but is required by the statute, and is a condition precedent to the power of the board of supervisors to act. The notice is jurisdictional. *Leflore County* v. *Cannon,* 81 Miss. 334, 33 So. 81; *Hinton* v. *Perry County,* 84 Miss. 536, 36 So. 565; *Herrick* v. *Pascagoula St. Ry. & Power Co.,* 97 Miss. 637, 54 So. 660; *Adams* v. *Bank,* 103 Miss. 780, 60 So. 770; *Henry* v. *Board of Supervisors of Sunflower County,* 111 Miss. 434, 71 So. 742; *Robb & Chichester* v. *Postal Telegraph Co.,* 104 Miss. 165. Suggestion of error, 104 Miss. 176, 61 So. 170-977.

It is unnecessary to dwell at length upon the failure of the record of the board of supervisors exhibited with the declaration herein and also exhibited with the special pleas to show the proper notice, since the plea alleges that no notice was ever given, and the appellant's demurrer and refusal to join issue or plead, followed by final judgment in the circuit court, admits and establishes the truth of this allegation and the invalidity of the assessment. However, it is perfectly obvious from the record why the able counsel for appellant should have declined to plead further and permitted judgment

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final to go against the appellant when his demurrer or motion was overruled. The minutes of the board of supervisors of the special meeting held on the 20th day of October, 1916, which are exhibited with the declaration, fail to show sufficiently the legal notice which, it is held in the Wheatley case, "the statute expressly provides for notice and which is required to be given for the benefit of the public generally."

It is apparent from an examination of this record of the board of supervisors that a traverse of the plea would have been wholly useless in this case. The board of supervisors, when equalizing matters of assessment, is a court of limited jurisdiction, and all of the jurisdictional facts must appear in the record and on the minutes of the board. The minutes must show a finding of all jurisdictional facts. In this instance, it is essential that the minutes should show that the notice was given at least five days before the meeting, and should show further the manner in which it was given, whether by posting at the courthouse or by publishing in a newspaper. The failure of the minutes to show this is fatal to the validity of any action taken by the board in reliance upon such alleged notice. *Leflore County* v. *Cannon*, 81 Miss. 334 33 So. 81; *Hinton* v. *Perry County*, 84 Miss. 536, 36 So. 565; *Herrick* v. *Pascagoula St. Ry. & Power Co.*, 97 Miss. 637, 54 So. 660; *Adams* v. *Bank*, 103 Miss. 780, 60 So. 770; *Henry* v. *Board of Supervisors of Sunflower County*, 11 Miss. 434, 71 So. 742; *Robb & Chichester* v. *Postal Telegraph Co.*, 104 Miss. 165; Suggestion of error, 104 Miss. 176, 61 So. 170, 977.

SYKES, J., delivered the opinion of the court.

This suit was brought in the circuit court of Leflore county by the state revenue agent against the appellee bank for the sum of $10,002.14, taxes claimed to be due the state, county, and levee district for the year of

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1916. To the declaration are made exhibits the various proceedings of the board of supervisors of Leflore county relating to these taxes. For an understanding of this opinion it is unnecessary for us to set out or consider all of the various steps taken in this matter. The board of supervisors was dissatisfied with the original assessment against the appellee bank and raised this assessment of its own motion, before any instructions were received by it from the state tax commission. After this was done, a communication was received by the board of supervisors from the above commission, instructing it to increase the assessment of "capital stock, surplus, and undivided profits of banks, less assessment of real estate, forty-two per cent." The board of supervisors, at a special meeting held in October, appointed a committee of five witnesses to appear before the state board and resist the suggested changes or raises in the assessment of the personal property in the county. The proceedings of this special meeting necessary to an understanding of the opinion are herein set out:

"Minutes, Board of Supervisors, Leflore County, Mississippi, October Special Term, 1916.

"The State of Mississippi, Leflore County.

"Be it remembered that on this the 20th day of October, A. D. 1916, the board of supervisors of said county met at the courthouse thereof, in the city of Greenwood pursuant to a call by the president of said board, as required by law, which call is in words and figures as follows, to wit:

" 'Special Meeting of the Board of Supervisors of Leflore County.—A special meeting of the board of supervisors is hereby called to be held at the courthouse, in Greenwood, Mississippi, on Tuesday, October 28, 1916, at ten o'clock a. m., for the purpose of correcting the county valuations upon the classes of property specified by the board of state tax commissioners, re-

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quired by the said board of state tax commissioners in its notice, now on file with the clerk of the said board of supervisors, and to take any and all such action with reference thereto as the board may deem proper.

"'Ordered this the 22d day of October, 1916. J. L. Haley, President of Board of Supervisors,'" etc.

These proceedings are made a part of the declaration in the case. It will be noted that the dates above shown are absolutely contradictory. The meeting appears to have been held on the 20th of October, 1916, in pursuance of a call for a special meeting which was to be held on October 28th. The call for the special meeting is dated October 22d. In other words, the call for the special meeting is dated two days after the special meeting is shown to have been held. This order of the special meeting does not show that it was either published in a newspaper or posted on the bulletin board at the court house.

The record in the case also shows that the state tax commission overruled the contention of the county and ordered the raise to be made in the personal assessment in accordance with its original instructions. Accordingly at the regular November meeting of the board of supervisors, the board attempted to comply with the order of the tax commission by making a horizontal raise on all classes of personal property, in accordance with the instructions of the state tax commission, without making any attempt whatever to equalize among the individual taxpayers the raise in these assessments. There was no notice given of this meeting of the board.

To the declaration a plea of general issue and a number of special pleas were filed. In these special pleas was raised the question of the power of the board of supervisors to raise the assessment of this bank without giving any notice of the same. The various pleadings in the case were filed, and the case was tried, before the decision of this court on the constitutionality

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of this act in *State ex rel.* v. *Wheatley et al.*, 113 Miss. 555, 74 So. 427. The revenue agent demurred to all the special pleas except one; he made a motion to strike that plea from the files. The demurrers and the motion to strike from the file was overruled. The revenue agent declined to plead further and judgment final was rendered in favor of the bank, from which judgment this appeal is prosecuted.

There are numerous defenses alleged in all these special pleas and argued before us. Our view of the case, however, renders it necessary to consider only the one question of notice. The decision in the Wheatley Case in construing section 6 of the state tax commission act, holds that under this section, before the board of supervisors can enter into equalization of the taxes, it is incumbent upon its president to give five days' notice, "by posting at the court house or publishing in a newspaper of the county," of the special meeting at which action is to be taken. Referring to this notice of the meeting of the board of supervisors, the court, through Judge STEVENS, in part, said:

"Section 6 does provide that the meeting of the board of supervisors is to be held upon notice; this notice is a general notice by publication and for the benefit of the public generally. By this notice every taxpayer is advised of the meeting and has a right to attend; by the terms of this section the board of supervisors are not directed to increase every individual taxpayer and fix an arbitrary percentage, but distributes the burden of increase amongst the individual taxpayers within the class of property affected by the order."

This notice is the due process of law which brings the individual taxpayers into court and renders the decision of the board of supervisors binding upon them. Unless this notice be given in accordance with section 6 of the state tax commission act, the board of supervisors is without jurisdiction to equalize these taxes. The order

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of the board of supervisors at this special October meeting which is above quoted, affirmatively shows that this notice was not given. Having failed to give this notice the board was without jurisdiction to raise the assessment of this appellee.

Neither was any notice given of the November meeting, when the assessment was finally raised. As to whether or not when notice has been given under section 6 of the act of the first meeting to consider the equalization, and where at this meeting the board appoints representatives to protest, as was done in this case, and the protest is overruled, and at a regular meeting of the board of supervisors the assessment is raised, it is necessary to give the five days' notice of the second meeting, we do not now decide, because the failure to give the notice of the first meeting in this case is fatal to the contention of the appellant.

It is too well settled in this state for us to cite authorities, that in this instance the board was acting as a court of limited jurisdiction, and that all of the jurisdictional facts must appear upon the minutes of the board to render its proceedings valid.

From the above it follows that the failure of the board of supervisors to give the five days' notice, as required by section 6 of the state tax commission statute (chapter 98, Laws of 1916), prevented them from acquiring jurisdiction of the appellee, and rendered their orders and proceedings upon which they attempted to raise this assessment absolutely void.

The judgment of the lower court is affirmed.

Affirmed.

RESPONSE TO SUGGESTION OF ERROR.

The declaration of the state revenue agent in this case was bottomed upon the void assessment of the board of supervisors entered at its regular November meeting. In the consideration of this case and the affirmance of

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the judgment of the lower court, there was no question raised as to the validity of the order of the board of supervisors at its September term in raising the assessment of this bank to two hundred and twelve thousand, one hundred sixty-six dollars and eighty-six cents; in fact, one or more of the special pleas of the appellee bank claim that this is the assessment upon which the bank is liable for taxes. The judgment of the lower court, and the affirmance thereof by this court, in no way precludes the tax collector from collecting taxes as assessed at the regular September meeting of the board above referred to

The suggestion of error is overruled.

EDWARD THOMPSON CO. *v.* FOY.

[76 South. 675, Division A.]

1. LIMITATION OF ACTIONS. *New contract. Correspondence.*
Where the purchaser of law books from a publishing company neglected to execute the installment notes therefor and some time thereafter wrote the publishing company, suggested that it make the purchase notes payable in installments of five dollars and ten dollars which was an alteration of the original agreement, and the publishing company accepted this proposition, this correspondence between the parties constituted a new written contract made and accepted by both parties, and the six year statute of limitations must be applied to such last contract.

2. CONTRACTS. *Offer. Signing on typewriter.*
A letter constituting a contractual offer signed on a typewriter, is valid and binding on the signer, if he wrote it and signed it on the typewriter, or authorized that to be done.

3. SALE. *Signing or authorizing letter. Question of fact. Modification.*
Under the facts as set out in its opinion in this case the court held that the letter constituting a contractual offer purporting to be signed by the buyer on a typewriter, was *prima-facie* evidence of his having written or authorized it, and his dispute of this fact raised a question of fact that should have been submitted to the jury.

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APPEAL from the circuit court of Newton county.

HON. J. D. CARR, Judge.

Suit by the Edward Thompson Company against Mr. P. Foy. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Shannon & Schauber, for appellant.

We submit that the letter dated January 25, 1909, and the reply to it dated February 3, 1909, form a complete written contract, all of the terms being contained therein, and we do not think under any view of the case, that any of the installments that became due and payable after October 5, 1909, would be barred.

The mere fact that the appellee did not execute his notes does not bring the quarterly installments within the six years statute of limitations. The principle involved is similar to the one approved of by this court in the case of *Washington* v. *Soria,* 73 Miss. 665; *Cock* v. *Abernathy,* 77 Miss. Rep. 872; *Fowlers* v. *Lea,* 84 Miss. 409; *Masonic Benefit Association* v. *First State Bank,* 55 So. 408.

If, however, the authenticity of the letter containing appellee's name, and dated January 25, 1909, is not admitted, we respectfully submit that whether this letter was written by the appellee or not is an issue of fact that should have been submitted to a jury under proper instructions from the court.

The testimony taken as a whole shows that appellee signed the original order, and even if it were altered by appellant's salesman, which was not proven nor admitted, the order was accepted by appellant, and the books shipped out and received by appellee, and were in his possession at the time they were destroyed in 1911. From the time of the execution of the contract on November 17, 1907, until the claim was placed in the hands of attorneys by appellant on October 27, 1909, appellant

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wrote appellee fifteen letters or more, all of which related to the sale of these books and many of them referred to former letters written by appellant to appellee all of which letters were sealed and mailed, postage prepaid, properly addressed, to the appellee. That these letters were received by the appellee, even though the receipt of them be denied by him, is a question of fact that should have been passed upon by a jury, although the defendant admits that he received certain of the letters and states that he does not remember whether he received other of them or not, but does deny receiving some of the letters. As to the letters introduced by appellee, which he received in the due course of mail, and which had the appellee's name signed to them, we think that even if the appellee had denied that he wrote all of those letters, and had denied that he authorized no one to write all of the letters, still this question of fact should have been submitted to a jury under the circumstances of the case.

In the case of *Braham* v. *Bank of Delight,* decided by the supreme court of Arkansas, and reported in 126 S. W. 394, 27 L. R. A. (N. S.) page 439, the court says: As a general rule, a letter that is offered in evidence must be authenticated by proving the genuineness of the signature of the writer. But when a letter is received in the due course of mail, and purports to be in answer to a letter that was previously duly addressed and mailed, the presumption arises that such letter is the genuine instrument of the purported writer; it is then sufficiently authenticated to go to the jury; and, upon its genuineness being denied, it then becomes a question of fact for the jury to determine as to whether the letter is genuine or not. 3 Wigmore, Ev., 2153; *Lancaster* v. *Ames,* 103 Me. 87, 17 L. R. A. (N. S.) 229; 125 Am. St. Rep. 286; 68 Atl. 333; *Lancaster* v. *Ames,* decided by the Maine supreme court and reported in 103 Maine, 87, 68 Atl., page 333, 17 L. R. A. (N. S.) page 229.

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The court will not presume that some stranger surreptitiously, or otherwise, got possession of the original letter and answered it, but will presume that such answer is the letter of the one whose name is signed to it, and will admit such reply letter in evidence without proving that it is in the handwriting of the party purporting to have sent it. *White* v. *Tolliver*, 100 Ala. 300, 20 So. 97; *Chicago, B. & Q. R. Co.* v. *Roberts*, 49 Pac. 428; *Scofield* v. *Parlin & Q. Co.*, 61 Fed. Rep. 804.

Byrd & Byrd, for appellee.

There was no sale of these books; there never was a meeting of the minds of the contracting parties. The books when destroyed, were the property of appellant, and even if there had been a meeting of the minds of the contracting parties and a complete sale, then appellant's claim is barred by the statute of limitations, and we respectfully submit that in any view of the matter this case should be affirmed.

HOLDEN, J., delivered the opinion of the court.

This in an appeal from the circuit court of Newton county, where the appellant, Edward Thompson Company, sued the appellee, M. P. Foy, attorney, for two hundred and seventy dollars, the purchase price of a set of law books. After the conclusion of the testimony introduced by the plaintiff, a peremptory instruction was granted to the appellee, Foy, from which action of the court this appeal is prosecuted here.

It appears that in November, 1907, the appellee, Foy, at Decatur, Miss., gave his written order to a salesman of the Thompson Company for a set of the second edition of the American & English Encyclopædia of Law, for which he agreed to pay the sum of two hundred and seventy dollars. The order was promptly accepted, and the books shipped to appellee at Decatur and were duly

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received by him. A few days thereafter the Thompson Company wrote appellee a letter and inclosed twenty-two notes, to be signed by him and returned, covering the amount of the purchase, according to the terms of the written order signed and delivered to the salesman; but appellee failed to sign and return these notes. Subsequently appellee wrote the Thompson Company that he had been absent from his office and sick, which had caused his delay concerning the notes for the books purchased. In this letter appellee requested, as a personal favor, that appellant change the notes so that they would fall due at a different time and for different amounts. Appellant, Thompson Company, refused to make the change requested at this time. On January 20, 1909, appellant again wrote appellee, requesting settlement for the books, and, in reply to this letter from appellant to appellee, appellee on January 25, 1909, wrote a letter to appellant, Thompson Company, which was written on the stationery of the law firm of Foy & Banks, of which appellee was a member, in which letter the question of the terms of payment of the contract were discussed, and appellee wrote that:

"This is now the only difference between us. If you are ready to make the installments five dollars and ten dollars, as I understood the contract to be, I am ready to pay off the past-due installments and take care of future installments as they may become due."

Both of the above letters were signed "M. P. Foy" with the typewriter. On February 3, 1909, appellant, Thompson Company, wrote appellee, accepting his offer of January 25, 1909, and making all installments five dollars and ten dollars, as mentioned in appellee's letter. In accordance with this proposition, made by appellee, Foy, and accepted by appellant, Thompson Company, the Thompson Company forwarded the notes to appellee, to be executed and returned to appellant; but appellee failed to execute these notes, and there the

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matter rested until October, 1909, when appellant placed the claim in the hands of an attorney for collection. This attorney did not make the collection, but held the claim in his hands until October, 1911. In the meantime the appellee wrote to appellant, in which letter he stated:

"You will please be quiet about the amount due the company until we get straight in the office again after a long absence. As soon as we are able, we will meet this."

But appellee did nothing further. The claim was then turned over to other attorneys for collection, all of whom did nothing with it. Finally, on October 5, 1915, this suit was filed in the circuit court of Newton county. Appellee, Foy, appeared and filed a plea of general issue and two special pleas, setting up the statutes of limitation of three years and six years.

It is unnecessary for us to discuss or consider what took place between the parties to this controversy prior to February 3, 1909, the date of acceptance by appellant of the terms of the contract proposed in the letter of January 25, 1909, by appellee, Foy, to the appellant. This correspondence constituted a written contract, made, accepted, and entered into by both parties with reference to the purchase of the books here in question. This being the written contract of that date, made and entered into by both parties, the statute of limitation of six years must be applied accordingly, and the amount of two hundred and fifteen dollars, which appears to be due by the appellee, Foy, to the appellant, Thompson Company, under this contract, within the six years prior to the date of filing of this suit, is not barred by the statute of limitations.

So far as the letter written by the appellee, Foy, being signed on the typewriter is in question, such letter is valid and binding on appellee, if he wrote it and signed it on the typewriter, or authorized it to be done. It

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does not appear conclusively in the record that he did not write and sign the letter, or did not authorize it to be done. Under the facts and circumstances, in connection with the whole transaction in this case, this letter, apparently written by appellee in answer to appellant's letter of January 20, 1909, is at least *prima-facie* evidence of his having written or authorized it; and his dispute of this fact raises a question of fact to be submitted to a jury. He proposed and named the terms of the purchase in his letter, which terms were accepted by the appellant, Thompson Company, and Foy having received and retained the books, which he has not paid for, it was error of the lower court to grant a peremptory instruction in favor of appellee.

The judgment of the lower court is reversed, and the case remanded.

Reversed and remanded.

BROOKHAVEN LUMBER & MFG. CO. v. POSEY.

[76 South. 731, Division B.]

PRINCIPAL AND AGENT. *Relation. Contract of hiring.*

Under the facts as set out in its opinion, the court held that the evidence was not sufficient to show that one employed by a mill to get logs out of the woods, had any authority real or apparent to make contracts of hiring with cutters or to change or modify contracts.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by Rufus Posey against the Brookhaven Lumber & Manufacturing Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

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Hannah & Foote, for appellant.

R. S. Hall, for appellee.

COOK, P. J., delivered the opinion of the court.

The plaintiff below, appellee here, began this suit against the appellant under chapter 131, Laws 1908, upon the theory that he was a "laborer or employee" of appellant, which was denied by appellant's plea. So that the question is, Does the evidence taken at the trial show that appellee was, in fact, a "laborer or employee" of appellant?

To begin with, it will be noted that the suit was brought against the appellant and one J. C. Moody, jointly. We gather from the evidence offered by the plaintiff that one J. C. Moody had contracted with the Brookhaven Lumber Company to cut and deliver logs to the lumber company at a stipulated price; that appellee contracted with Moody to cut a part of these logs, but after he had begun the cutting, his laborers, on account of Moody's reputation as a paymaster, refused to continue the work. Thereupon appellee went to Mr. Batson, the "woods foreman" of the appellant lumber company, and explained the situation to him. Appellee testified that Mr Batson, after appellee had stated the situation, said to him, "You go ahead and you will not lose anything," whereupon he told his employees what Mr. Batson had said, and acting upon this assurance he and his employees cut the logs at the agreed price of forty cents per thousand, and they were delivered to the lumber company and by it manufactured into lumber.

Mr. Batson denied that he had ever had the alleged conversation with Mr. Posey or his employees, and upon this controverted contract there was a sharp conflict in the evidence. The lumber company pleaded that Mr. Batson had no authority to make this contract, and if he did make the contract as stated, the company was not

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bound by it, for, at most, it was a verbal promise to pay the debt, default or miscarriage of another. We think that the evidence conclusively establishes a lack of authority in Batson to make the contract he is alleged to have made for the lumber company.

The evidence shows that Mr. Batson was employed to get the logs out of the woods and to the mill, but he some times delivered written specifications provided by the agent of the company who had charge of the contracts. It expressly appears that Mr. Batson was not authorized to make contracts with cutters, or to change or modify contracts already made by the contracting authorities of the lumber company. It nowhere appears that the lumber company had ratified any contracts made by Batson, or that they had in any way clothed him with the apparent authority to make contracts for it. The evidence not only fails to prove that Batson had any authority, real or apparent, to make the contract he is alleged to have made, but the evidence does affirmatively show that Batson did not have authority to bind the company, if he, in fact, assumed to do so.

The fact that the suit was brought against the lumber company and Moody jointly is somewhat significant. It seems that the suit was to recover from Moody, as principal, and against the lumber company, as surety or guarantor, which would imply uncertainty upon the part of the pleader as to who was liable, or at least as to whether the lumber company was primarily liable. However that may be, we rest our decision upon plaintiff's failure to establish that Mr. Batson was authorized to bind appellant, and upon the positive evidence to the contrary.

Reversed and dismissed.

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THORNTON-CLANEY LUMBER CO. v. J. M. O'QUIN & SONS.

[76 South. 732, Division B.]

1. INJUNCTION. *Wrongful injunction. Damages. Attorney fees.*
In an action for damages for the wrongful suing out of an injunction preventing defendant's delivery of lumber, which it had sold to others, the measure of damages, as to attorney fees, where the bill was demurred to is the reasonable amount of attorney fees for the hearing of the demurrer to the bill in the court below and in the supreme court on appeal, but no allowance should be made for services in a suit which arose subsequent to the dissolution of the injunction.

2. SAME.
In such case the damages after allowing attorney fees, would be the difference in the value of the lumber at the time of the suing out of the injunction and its value at the period of dissolution, with interest on the difference from the date of the suing out of the injunction.

APPEAL from the chancery court of Pike county.

HON. R. W. CUTRER, Chancellor.

Bill for accounting and for an injunction by Thornton-Claney Lumber Company against J. M. O'Quin & Sons. Injunction issued, demurrer to bill sustained, and decree affirmed on appeal, and defendant thereafter filed a suggestion of damages for the wrongful suing out of the injunction, and from a decree awarding damages, the Thornton-Claney Lumber Company appeals.

The facts are fully stated in the opinion of the court.

Jones & Tyler, for appellant.

The second assignment of error is directed to the award of three hundred dollars attorneys' fee. The suggestion of damages filed was for five hundred dollars "all attorney's fees in the original suit in chancery court and supreme court and all litigation in this suit."

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We submit, first, that no attorney's fees should have been allowed to the appellees because the record shows beyond dispute that there was no service rendered in the matter of the dissolution of the injunction. There was no application to dissolve, nor any step taken in that behalf. Counsel appeared for the appellees five months after the writ was issued and made a defense to the merits of the bill. Two months later that defense was considered by the court, held to be good and the suit dismissed. The dismissal of the bill, of course, dissolved the injunction. On appeal to this court the case was considered on its merits, and nothing was done save what was necessary to defeat the main suit filed by appellant.

Neither can it be said that the bill as filed was solely one for an injunction. The injunctive relief was ancillary or auxiliary to the main relief prayed for in the bill. The prayer for injunction could have been stricken from the bill and there remained to be determined the damages sustained by appellant by the refusal of appellees to comply with their contract of sale of lumber, on an accounting of the various sizes and grades of lumber involved. On motion to dissolve, the court might have properly dissolved the writ and remitted complainants to the loss sustained on an accounting in the event the defendant persisted in disposing of the lumber sold.

It is a familiar rule of law that while attorney's fees are an element of damages on an injunction bond, they are confined to services employed in and about the dissolution of the injunction. This subject is exhaustively treated in a note to *Littleton* v. *Burgess* (Wyo.), 16 L. R. A. (N. S.), page 49; at page 64, title V, the author of the note says: "The writ of injunction is a collateral process, which may or may not be resorted to; and therefore, liability for counsel fees upon the bond given to procure it is limited to such as are paid or incurred in procuring its dissolution."

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In support of the foregoing text, cases are cited from the supreme courts of Alabama, California, Colorada, Illinois, Iowa, Kentucky, Louisiana, Missouri, Nebraska, Ohio, and South Carolina. To support the rule the author cites as authority the states of Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, and Washington. *Jamison* v. *Dulaney,* 74 Miss. 890, and *Curphy* v. *Terrell,* 89 Miss. 642; *Thomas* v. *McDaneld,* 77 Iowa, 302; *Littleton* v. *Burgess,* 16. L. R. A. (N. S.), at page 71, par. B, to title VIII.

In this connection it is well to observe that our court cites and follows the supreme court of Alabama in both the *Jamison* and *Curphy cases, supra,* and specially mentions the distinction drawn by that court, in *Curry* v. *American Freehold Land Mortgage Co.* (Ala.), 27 So. 454; *Millspaugh* v. *Jackson,* 14 So. 44; and *Bolling* v. *Tate,* 65 Ala. 417.

If, therefore, appellant is liable to appellee at all, the extent of the decree should be the difference between, Item 5, $243.90, Item 6, $130.83, $374.73, and the difference in value of the lumber as above, $342.00 is $32.73 Net Loss to appellee.

L. H. McGehee, for appellee.

The first cross assignment of error brings into review the action of the court in allowing appellee damages at the rate of seven dollars and fifteen cents per one thousand feet on forty-three thousand one hundred sixty-nine feet of lumber.

The testimony for the defendants, appellees, which the court finds to be true, shows that appellees contracted to sell No. 1 grade of lumber to the Thornton-Claney Lumber Company at eleven dollars per one thousand feet, and that about seventy-five per cent. of the lumber was the No. 1 grade, and contracted to sell the No. 2 grade or

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about twenty-five per cent. of the lumber at nine dollars per one thousand feet, or an average price excess of ten dollars per one thousand feet. That only a few days later the defendants sold the entire lot of lumber, after finding out the fraud that had been perpetrated upon them, at an average price of ten dollars and fifty cents per one thousand feet. The record also shows that between the 12th day of June, 1912, the time the injunction was sued out, and the 21st day of June, 1915, the date the injunction was finally dissolved, No.1 grade, common and better, increased five dollars per one thousand feet in price, and that the average increase in price on all grades during this time was from three to four dollars per one thousand feet.

Now it will be remembered that the appellees were enjoined from selling this lumber at this price; therefore, by reason of the injunction, the appellees were denied the right and prevented from obtaining, even on the least calculation of three dollars per one thousand feet, the sum of thirteen dollars and fifty cents per one thousand feet, for all the lumber that they had on hand, to wit: two hundred and fifty thousand feet.

This brings us to a consideration of the errors alleged by the appellant on the direct appeal. It is first said that appellees are entitled to no damages at all by way of attorney's fees, because of the services rendered in this case by the attorneys was not in and about the dissolution of the injunction, and as the injunction was mere ancillary to the principal object of the bill of complaint, that no fees at all can be allowed.

Under this phase of the case, the bill falls squarely within the rule announced by this court in *Jamison* v. *Dulaney*, 74 Miss. 890; *Curphy* v. *Terrill*, 89 Miss. 624, and it may be remarked in passing that "the dismissal of the bill on the final hearing or on demurrer amounts to a final disposition of the cause, adverse to the plaintiff

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and entitles defendant to bring an action on the bond." 10 Enc. Pl. & Pr. 1123.

Counsel insist, however, that even if appellees are entitled to damages by way of attorneys' fees, the allowance is excessive, and that the decree of the court really included attorneys' for services rendered in and about defending the suit on the merits. This is a total misconception of appellees' claim in this connection. Appellees claim is predicated upon the universally recognized rule that they are entitled to all damages resulting, proximately from the wrongful suing out of the injunction. This damage necessarily includes all expenses necessarily incurred by the appellees in and about procuring the dissolution of the injunction, and obtaining compensation for its wrongful issuance.

The real gist of appellees argument is that even if you are entitled to damages for legal expenses necessarily incurred in getting the injunction dissolved, you are not entitled to any compensation for counsel necessarily employed in getting these damages assessed. Our contention is directly opposite.

This case does not present a case where the appellees are seeking to recover attorney's fees for defending the merits of the case. If the injunction was mere ancillary to the case and if the injunction had been dissolved, the case had to be fought out on its merits on some other proposition and the attorneys' fees in connection with the merits could not be said to be approximately caused by the wrongful issuance of the injunction, but where as here, the damages claimed and allowed are irrevocably connected with and grew out of the wrongful issuance of the injunction, there is no principle of law, equity or morals, which will deny appellees right to recover such damages.

Generally we want to say that upon this record, appellant has no cause at all to complain and should congratulate itself that it escaped in the lower court as easily as it did.

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ETHRIDGE, J., delivered the opinion of the court.

J. M. O'Quin & Sons, appellees, were lumber manufacturers and dealers, and the Thornton-Claney Lumber Company was a corporation doing business at Chicago, Ill., and engaged in the buying and selling of lumber. The agent of the Thornton-Claney Company went to the appellees to buy about two hundred fifty, thousand feet of lumber then on the yard of appellees. An order was written out and signed by the agent of appellant and the appellees, but the order was signed immediately before the arrival of a train, and the appellees claimed not to have read the order, but signed it hastily so the agent of appellant could catch the train. They claim that when the copy of the order was returned to them, about a week after the signing, that it did not contain the agreement as actually agreed upon, and they refused to ship the lumber. The appellant claims to have bought the lumber at nine dollars per thousand, and testified that the order was written as agreed, and was returned the following day. The appellees refusing to deliver the lumber, appellant filed a bill in the chancery court alleging the contract, and making the order signed by O'Quin & Sons an exhibit thereto, alleged the buying of the lumber, and that because of the peculiar facts, and of the various grades of lumber included in the order, there should be an accounting, and prayed for an injunction against the sale of the lumber by appellee, and an injunction writ was issued. A demurrer was filed to the bill and sustained by the court, from which an appeal was taken to this court, and the decree affirmed here. There was no motion to dissolve the injunction.

After the decree was affirmed here, appellees, O'Quin & Sons, filed a suggestion of damages in the chancery court, but the appellant refused to appear for some

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time thereafter, on the theory that the chancery court had no jurisdiction of the cause, but finally an agreement was entered into in which it was provided that the Thornton-Claney Company could propound their claim for damages for breach of the contract, and the defendants, O'Quin & Sons, could file their claim for damages for the wrongful suing out of the injunction. Thereupon the chancery court took jurisdiction of the cause, and, after hearing evidence, held that the order signed by O'Quin & Sons was of no effect and void, and then awarded damages for the suing out of the injunction, in which it allowed three hundred dollars, as attorney's fee; ninety-four dollars, for extra expense of moving forty-seven thousand, four hundred and twenty-two feet of lumber, at two dollars per thousand; seven dollars and fifty cents per thousand for forty-three thousand, one hundred and sixty-nine feet of lumber on which there was a total loss; and eight dollars and sixty-five cents per thousand for seventeen thousand, one hundred and two feet, total loss—making a total of nine hundred and fifty-one dollars. From this decree the Thornton-Claney Company appeals here.

On the trial the evidence as to attorney's fees showed that one hundred dollars was a reasonable fee for the original hearing on the demurrer in the court below; and that seventy-five dollars was a reasonable fee for prosecuting the appeal here. The court also allowed one hundred dollars for feeding oxen for a reasonable time after suing out the injunction, and also allowed one hundred and twenty-five dollars attorney's fee in the present suit.

It seems there were approximately two hundred and fifty thousand feet of lumber on hand at the time the injunction was sued out, and that two hundred and twenty-five thousand feet of this lumber was contracted to be sold to another party by appellee, at ten dollars and fifty cents per thou-

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sand, but because of the suing out of the injunction, delivery was not made. The injunction was sued out in 1912, and in 1913 the lumber advanced about five dollars per thousand over the price in 1912. After the appeal was taken to the supreme court, there was an effort made by appellant here to have O'Quin & Sons agree to a sale of the lumber as it then stood, at the market price, and have the litigation continue so as to settle the rights of the parties as to who was entitled to the proceeds of the lumber. This O'Quin & Sons refused to do. The suit was finally affirmed in the supreme court in 1915. It appears that a considerable amount of lumber on the yard was sold in 1915 and 1916 after the affirmance in the supreme court, and that some of the lumber on the yard could be worked over at an expense of one dollar and fifty cents per thousand, and then marketed at an advance of about five dollars over the price in 1912. The appellant claims the court, in assessing the damages, refused to allow the increased value of the lumber caused by the advance of the market, while charging the appellants with the damage to the lumber on the yard and for the value of the lumber that was no good, or a total loss, and that this value, if allowed, would reduce the judgment to the extent of three hundred and forty-two dollars. The chancellor, in his decree, does not enter into a specific finding of fact, but it does not appear that he made allowance for the increased value of the lumber. It rather appears, on the contrary, that he failed to make allowance for this increase in the value of the lumber that was sold.

We think the measure of damages in this case would be the amount of attorney's fees expended in the first suit, the amount appearing to be one hundred and seventy-five dollars, but no allowance should be made for services in the present suit, as it has

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arisen subsequent to the dissolution of the injunction, and then the damage, after allowing attorney's fees, would be the difference in the value of the lumber at the time of the suing out of the injunction and its value at the period of dissolution, with interest on the difference from the date of the suing out of the injunction. This rule is announced in *Rubon* v. *Stephan*, 25 Miss. 253.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

ADAMS v. YAZOO & M. V. R. Co.

[76 South. 733, Division B.]

1. CARRIERS. *Passenger trains. Passenger depot. Code* 1906 *sec.* 4867. Where the train upon which plaintiff took passage carried passengers and took on passengers at a point and time in question, it was a passenger train within the meaning of Section 4867, Code 1906, providing that every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival and one-half hour after the departure of passenger trains; and all reception rooms shall be made comfortable and properly heated.

2. CARRIERS. *Station. Duty of carrier.* Where a station was a regularly established station and the railroad company had a waiting room for passengers and sold tickets, checked baggage, etc., at that point and trains stopped there for passengers on flag and frequently without flagging, plaintiff, an intending passenger, had a right to rely thereon.

3. CARRIERS. *Care of station. Passenger station.* Since under Code 1906, section 4867, so providing, carriers are required to keep "all passenger stations" open and comfortably heated for intending passengers, a regularly established station did not cease to be such within the meaning of the statute because some of its trains only stopped on flag, and the company having invited the public to take passage at that point, it was its duty to keep its waiting rooms open and comfortably heated for passengers about to take its trains.

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APPEAL from the circuit court of Bolivar county.

HON. W. A. ALCORN, Judge.

Suit by Geo. M. Adams against the Yazoo & Mississippi Valley Railroad Company. Peremptory instruction for defendant and plaintiff appeals.

The facts are fully stated in the opinion of the court.

B. B. Carmichael, for appellant.

Section 4867 provides as follows: "Every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival, and one-half hour after the departure, of passenger trains; and all reception rooms shall be made comfortable, and shall be kept in a cleanly and decent condition, and properly heated when necessary and properly lighted at night."

This statute is plain and unambiguous and in plain words says: "All passenger stations" and I submit that the courts cannot braid a limitation on it, the word all means "all" and is used to describe all passenger stations and reception rooms where the carrier has a station building. If the legislature had expected to except flag stations it would have said so.

Judge COOK in *Southern Railway* v. *Williams,* 102 Miss. 612, said, it is unnecessary to cite authorities for the statement that the common law, in the absence of any statute requires all common carriers of passengers to keep their waiting room open and comfortably heated for a reasonable time before the arrival and departure of all trains.

In the case of *Metcalf* v. *Yazoo & Miss. Val. R. R. Company,* 97 Miss. 455, 52 So. 355, where the court was construing the various laws relating to depots, waiting rooms, etc., the following is stated which leaves a passenger's rights without cavil. "By section 4854, it is made the duty of every railroad to establish and maintain such depots as shall be reasonably necessary for the public convenience; by section 4867 it is made

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the duty of every railroad to keep rooms open for the reception of passengers at least one hour before the arrival and one-half hour after the departure, of all passenger trains." Thus the law requires the railroads shall have depots, and that they shall make them comfortable and accessible at reasonable times to intending passengers. It would be useless for the statute to require railroads to keep rooms open for the reception of passengers an hour before the train, unless intending passengers could make lawful use of the rooms within that period of time. When an intending passenger avails himself of the convenience which the law has established for his benefit, and which the railroad must provide, his object being to facilitate and further his purpose to take passage, such person, while on the depot grounds or in the waiting room, is a passenger, and entitled to all the protection of a passenger.

To hold otherwise would place the rights of persons accepting the conveniences provided by law for their benefit in a precarious and uncertain condition, and relieve the railroad company from a duty which they stand under to the traveling public, for which no sensible or just reason can be assigned.

I conceive that the legislature of Mississippi never had in mind that a common carrier should have the right to meet a passenger at the locked door of a waitingroom and inform him that a comfortable place to wait a train was only afforded those who patronized particular trains and invite him to beat a path on the leeward side of the depot until his train arrived, and refused to furnish him any information as to when he could reaonably expect the train; this would be discrimination in the extreme.

While the supreme court never rendered a written opinion in the *Morgan case, supra,* other states having a statute identical with the one in this state have

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passed on the liability of the carrier at flag stations, one of which is in Texas. Sales Anno. Stat., article 4524.

The supreme court after the adoption of that statute said: "A railroad company will be held liable to a passenger caused by not having its depot open for the required time at a flag station where it sold tickets and maintained a passenger depot." *St. Louis, etc., R. R. Co.* v. *Rumfield,* 118 S. W. 810.

"A railroad company must furnish suitable waiting rooms for passengers and keep the same open for all regular trains and for trains which stop on signal. *Chicago & Alton R. R. Co.* v. *Walker,* 75 N. E. 520.

"A railroad company agreeing to stop its trains at a station to take a passenger, agrees to keep open its waiting rooms for the accomodation of the passenger while waiting for the train." *Draper* v. *Evansville R. R. Co.,* 74 N. E. 889.

Mayes, Wells, May & Sanders, for appellee.

That the court below was correct in his ruling seems to have already been adjudicated by this court in the case of *Greer* v. *Y. & M. V. R. R. Company,* decided November 29, 1909, without a written opinion, Record No. 14985. In that case the peremptory instruction was granted for the defendant; and on appeal to this court the judgment was affirmed.

We respectfully contend that section 4867 is not applicable to any train which stops at a particular station on flag, when the station is not a regular scheduled stop for the train, and when as a matter of special accomodation it has been arranged for the fast trains to stop occasionally.

We direct the attention of the court to some adjudications from other jurisdictions which we think support our contentions. *Railroad Company* v. *Railroad Commission,* 33 So. 219; *Railroad Company* v. *Newell,* 106 Pac., 82, citing *Railroad Co.* v. *State,* 103 Pac. 617.

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We have sought but failed to find an adjudicated case identical in all of its aspects, with the case at bar. But there are two decisions from Kentucky which are in point, that state having a statute very similar to ours. *Railroad Co.* v. *Commonwealth,* 43 S. W. 458; *Railroad Co.* v. *Lanhorn,* 167 S. W. 133; *Sandifer Admr.,* v. *Railroad Co.,* 89 S. W. 528; *Chesapeake & Ohio Ry. Co.* v. *Lanhorn,* Court of Appeals of Kentucky, May 29, 1914.

In the instant case, it was shown that Gunnison is a station on the line of the Yazoo and Mississippi Valley Railroad. It is a small, unincorporated village of about three hundred people. At that station a waiting room for passengers is maintained, but during the period from seven o'clock p. m. to seven o'clock a. m. it is not opened or lighted or heated. Only two employees are provided, one being station agent who was also telegraph operator, and the other a negro porter. The hours of service of these two employees is from seven a. m. to seven p. m.

It would be impossible for the carrier to personally notify each and every prospective passenger, which of its stations are flag stations, and which of its trains are due to stop on being flagged. The usual, customary and approved method of importing such information is, by published time cards, which are published and circulated for the information of the traveling public. Indeed in this case the plaintiff admitted that he had the time card and knew by reference to it that Gunnison was a flag stop for that train. The meaning of a "flag stop" for a railroad passenger train, is well known, and when the plaintiff, who was a traveling man and accustomed to reading time tables, saw that Gunnison was a flag stop for the train he admitted that he knew what it meant, and he was bound to take due notice thereof and govern himself accordingly. There was an open restaurant within one hundred feet of the station where he could have gone and been

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sheltered and protected, but he chose not to do so. He had no right to expect more than "flag stop" accommodations at that station, because he knew before he went to the station that it was a flag stop for the train. It was not the duty of the carrier at this station to have the waiting room open, heated and lighted, unless it is the legal duty of the carrier to comply with the requirements of the statute (Section 4867 of the Code of 1906) at flag stops, as well as at other stations.

The suit was filed and prosecuted upon the assumption that every statute of the state relating to the operation of railroads, applies to all stations, at all hours of the day or night, without exception and without regard to whether station is a flag stop or a union station. We submit that this assumption is erroneous, as appears by the adjudications of this court, as well as by those of other courts cited *supra*.

ETHRIDGE, J., delivered the opinion of the court.

George M. Adams brought suit against the Yazoo & Mississippi Valley Railroad Company for injuries to his health, alleged to have been caused by exposure to cold weather while waiting for a train at Gunnison, a station on the Yazoo & Mississippi Valley Railroad Company; it being alleged by the plaintiff that the depot of defendant was not open so that the plaintiff could enter it, and that the depot was not properly lighted and heated. Plaintiff alleges that he went to the depot about fifteen minutes before the scheduled time for the arrival of the train; that on reaching the depot the door was locked and the waiting room closed, though the agent of the company was inside at work; that plaintiff beat upon the door and window, trying to attract attention, but that no notice was paid to him. He further alleges and proves that the train was thirty-five minutes late; that the weather was cold, wind blowing, and rain and sleet falling during the

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period of his wait; that as a result he was thoroughly chilled, and after taking the train he had a chill, and was confined to a bed on reaching Rosedale until the following evening, when he went to Greenville, and was there confined in his room for a week, after which time he went to Columbus, and was confined to his home for several weeks. It is alleged that the exposure brought on an attack of la grippe and muscular rheumatism; that the health of the plaintiff was permanently injured, his weight greatly reduced, and as a result of the exposure, and ill health resulting therefrom, plaintiff lost his employment as a traveling salesman for a patent medicine manufacturing concern; and also was unable to attend to other business, resulting in losses, according to plaintiff's testimony, of about one thousand, eight hundred dollars per annum.

The exposure complained of occurred on the night of the 18th of March, 1914. The cause was tried at the October, 1915, term of the circuit court. The company filed a plea of general issue only, but defended upon the theory that the station at Gunnison was only a flag stop for the particular train upon which the plaintiff desired to take passage, and that, as a result, they were not required to keep the station open and the reception room properly lighted and heated for passengers for this train. It appeared from plaintiff's testimony that the train stopped without being flagged, and it appeared from the defendant's evidence that the train in question was marked in the schedule timetable as a train that would stop on flag; but it appears that the train actually stopped each evening, except Sundays, to take on mail.

It was contended by the defendant that it could not work its office employees longer than thirteen hours per day, and that to require it to keep the station open and rooms heated for this train, which was scheduled to arrive at 8:52 p. m., would require the employing of extra forces. It developed on trial that the coal used to

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make the fire required by statute, to wit, one hour before the arrival of a train, and one-half hour afterwards, would cost about ten cents per day; and that it would require some expense to procure a person to make and attend the fire. Section 4867, Code 1906, is as follows:

"How Rooms to be Kept Open, etc.—Every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival, and one-half hour after the departure, of passenger trains; and all reception rooms shall be made comfortable and shall be kept in a cleanly and decent condition, and properly heated when necessary, and properly lighted at night. The agent or person in charge shall preserve order, and, if necessary, eject any person whose conduct is boisterous or offensive."

It appears in evidence that the station at Gunnison was a regularly established station, and that the defendant had a waiting room for passengers, and sold tickets, checked baggage, etc., at that point. Was the station at Gunnison a passenger station within the meaning of the statute above quoted, requiring all passenger stations to be kept open, lighted, and made comfortable before the arrival, and after the departure, of a passenger train? The undisputed evidence shows that the train of defendant stopped for passengers on flag, and it seems to have stopped frequently without flagging. This being true, the company invited the traveling public to patronize this station for the purpose of taking this train. It was a train that carried passengers, and took on passengers at this point at the time in question, and was, therefore, a passenger train. We think the plaintiff had a right to rely upon this for the purposes of taking passage on the train.

In the case of *St. Louis, etc., R. Co.* v. *Rumfield*, 55 Tex. Civ. App. 73, 118 S. W. 810, a case similar to this one, a statute of Texas provided:

"Every railroad company doing business in this state shall keep its depots or passenger houses in this state

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lighted and warmed and open to the ingress and egress of all passengers who are entitled to go therein for a time not less than one hour before the arrival and after the departure of all trains carrying passengers on such railroad, and every such railroad company for each failure or refusal to comply with the provisions of this article shall forfeit and pay to the state of Texas the sum of fifty dollars, which may be sued for and recovered in the name of said state in any court of competent jurisdiction, and shall be liable to the party injured for all damages by reason of such failure."

In that case the appellee, Rumfield, who lived about two miles from Smithfield, a station on the line of appellant, was summoned as a venireman to court, and on the morning in question went to the station early in the morning for the purpose of catching the train to Ft. Worth so as to reach there in time for jury service. He did not know the exact time the train was due, but knew that it was early in the morning. He reached the station about five a. m., and found the building dark and the door locked. He tried to arouse the sleeping agent, but failed. The weather was cold and he "nearly froze while beating a path on the leeward side of the station." He renewed his efforts to get a response from the sleeping agent, and finally succeeded in arousing him, but the agent refused to get up, asking who it was. The party told him of his condition and of being cold, but the agent slept on. He finally did arouse the agent, however, a few minutes before the arrival of the train, but stated that he did not get warm until he reached Ft. Worth, where he became sick by reason of the exposure. Suit was brought against the railroad, and a verdict recovered, which was upheld by the supreme court.

In the case of *Chicago, etc., R. Co.* v. *Walker,* 217 Ill. 605, 75 N. E. 520, the supreme court of Illinois held that a railroad company must furnish a suitable waiting room for passengers, and keep the same open for all regular trains and for trains which stop on signals.

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In the case of *Williams* v. *Southern Ry. Co.*, 102 Miss. 617, 59 So. 850, this court held that it was the duty of a railroad company, independent of section 4867 of the Code, to keep their waiting rooms open and comfortably heated for a reasonable time before and after the arrival and departure of passenger trains, and that it was a question for the courts to determine as to what is a reasonable time when the statute (section 4867 of the Code) did not apply; that the minimum prescribed by the statute did not govern in all cases, especially in cases where two railroads had a union depot, and a passenger arriving over one road intending to take passage on another should have a room comfortably heated while waiting between trains of the two roads. In that case the statute did not apply, and in the present case the statute does apply; and as the statute uses the term, "all passenger stations," we do not think the station at Gunnison ceased to be a station, within the sense and meaning of the statute, because the train in question only stopped on flag. The company having invited the public to patronize its trains by taking passage thereon, and having erected a station, it was in duty bound to keep its waiting rooms open and heated for the comfort of passengers using said trains.

The court below having given a peremptory instruction for the railroad company, the judgment is reversed, and the cause remanded.

Reversed and remanded.

JONES ET AL. *v.* GRIMES ET AL.

[76 South. 735, Division A.]

1. CANCELLATION OF INSTRUMENTS. *Pleading. Bona fide incumbrances. Demurrer.*

The *bona-fide* purchaser or incumbrancer for value defense is an affirmative one, and must be raised by plea or answer unless all

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the facts necessary to establish it are alleged in the bill, in which event it can be raised by demurrer.

2. SAME.

Where a bill by the widow and children of a deceased grantor to cancel his deed, and trust deeds given by the grantee, alleged that after the death of the grantor the grantee executed certain trust deeds to defendants to secure loans for stated amounts, and that during such time plaintiff continued in possession, thus negativing knowledge or notice of plaintiff's claim on the part of defendant mortgagees, except such as would be implied from plaintiff's possession. In such case defendants could take advantage of their claims, as *bona-fide* incumbrancers for value, by demurrer.

3. MORTGAGEES OR BONA-FIDE PURCHASER. *Notice of claim of vendor. Possession.*

The exception to the general rule that possession of the land with claim of interest by the grantor is not, after the recording of a deed executed by him, notice to an innocent purchaser for value from his grantee of his claim or interest therein, is not subject to the qualification that where the possession of the grantor is long continued, a purchaser or mortgagee is put upon notice.

4. MORTGAGEE AS BONA-FIDE PURCHASER. *Notice. Possession by wife after husbands death.*

Even though it be conceded that the rule that possession of the grantor, after deed by him has been recorded is not notice of claim by him, is not applicable because the trust deeds sought to be cancelled were executed by the grantee after the grantor's death, and while the plaintiffs, the wife and children of deceased, were in possession, this will not avail plaintiff, where the wife joined in the deed by the husband, and the bill avers no change in possession of the land after her husband's death, such as would arrest attention and excite inquiry, but simply that the wife has continued in the use and possession of the property ever since.

5. MORTGAGEES. *Notice. Possession.*

Mortgagees to whom a grantee in a deed, gave trust deeds subsequent to the grantor's death, having no notice of plaintiff's claim except that plaintiffs were in possession of the land as wife and children of deceased, were bona-fide incumbrancers for value without notice of plaintiffs' claim.

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APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Bill by Katie Jones and others against Allen Grimes and others. The unnamed defendant filed demurrers which the court sustained, allowing an appeal to the supreme court to settle the law involved in the case.

The bill in this case was filed by the appellants, Katie Jones, John Jones, Jr., and Sarah Blackman, the widow and children of one John Jones, deceased. The bill alleged that during the life of said John Jones he and appellant Katie Jones, his wife, executed to Allen Grimes a deed, conveying certain lands owned by said John Jones; that they were deceived by said Allen Grimes into believing that the instrument executed was a will, whereby said John Jones was devising the property to his wife, he being at that time and for a long time previous an invalid. Both Jones and his wife were illiterate negroes; they acknowledged the instrument before a justice of the peace, making their marks, as they could neither read nor write. The bill alleges that the act of Grimes in procuring the execution of this purported deed was gross fraud, and conveyed no title to the property in question. After the death of John Jones, Sr., Grimes executed a deed of trust to L. S. Hirsch, trustee for Mrs. Laura Falk, to secure the sum of five hundred dollars loaned Grimes, and afterward executed another deed of trust to J. B. Dabney, trustee for J. L. Stinson, to secure a loan of three hundred and twenty dollars. During this time appellants had continued in possession of the property. Afterwards they discovered that the instrument which they supposed was a will was in fact a deed, conveying the property to Grimes. They alleged in the bill that they are the lawful heirs of John Jones, deceased, and they make defendants Grimes and the trustees and beneficiaries in the two deeds of trust referred to, and pray that all claim of any of the defendants be canceled and

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held for naught, since the deed held by Grimes to the property was void, because of fraud practiced by him. Grimes answered the bill, denying fraud, and the holders of the two deeds of trust, and the trustees each filed demurrers, which the court sustained, and allowed an appeal to the supreme court to settle the questions of law involved. The case as to Grimes, who answered the bill, is still pending.

Henry & Canizare and *Anderson, Voller & Kelly,* for appellants.

Burnini, Hirsch & Griffith, for appellees.

SMITH, C. J., delivered the opinion of the court.

Two questions are presented by this record: First, Can the *bona-fide* incumbrancer for value defense be here raised by demurrer; and, in event that question is answered in the affirmative, second, does it appear from the bill that appellees are *bona-fide* incumbrancers for value without notice of appellants' claim of ownership of the land?

The *bona-fide* purchaser or incumbrancer for value defense is an affirmative one, and must be raised by plea or answer, unless all the facts necessary to establish it are alleged in the bill, in which event it can be raised by demurrer. *Greaves* v. *Atkinson,* 68 Miss. 598, 10 So. 73. The bill here under consideration alleges that appellees are incumbrancers for value, and that the notice they had of appellants' claim to the land is such as the law will imply, because of appellants' possession thereof at the time of the execution of the deeds of trust here sought to be canceled, thereby negativing knowledge or notice of such claim on the part of appellees from any other source, so that, in the event appellees were not charged with notice of appellants' claim to the land because of their possession

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thereof, it will appear from the bill that appellees are *bona-fide* incumbrancers for value. The first question, therefore, must be answered in the affirmative.

It is admitted for appellee that: "While the general rule is that possession of land by one claiming some interest therein is notice to the world of the character and extent thereof, a well-defined exception to this rule is that possession of land, with claim of interest therein by a granter thereof, is not after the recording of the deed executed by him notice to an innocent purchaser for value from his grantee of his claim of an interest therein" but their contention is that this exception to this general rule is subject to the qualification "that where the possession of the grantor, after his conveyance of the land, is long continued, a purchaser or mortgagee of the land is put upon notice of such possession, and is legally bound to make inquiry as to the rights or claims of the possessor to the land, and such possession becomes notice to the purchaser or mortgagee of the occupant's claim and right to his possession, and thereby the original doctrine, that possession is notice, becomes operative," in which they are supported by several authorities. We cannot admit the soundness of this qualification, for so to do would be to allow a grantor to deny the validity of his deed which, by being recorded, has been published to all the world as conveying title to the grantee therein, and which has been relied upon by subsequent purchasers, and thus defeat one of the main objects of our laws regarding the recording of conveyances. *Hafter* v. *Strange*, 65 Miss. 323; 3 So. 190, 7 Am. St. Rep. 659; *Baldwin* v. *Anderson*, 103 Miss. 463, 60 So. 578, in which case the possession of the grantor was from the 15th day of July until the 7th day of June of the next year.

But it is said that the rule itself has no application here, for the reason that the deeds of trust sought to be canceled were executed after the death of John Jones, the owner of the land, and when it was in the possession

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of appellees, his wife and children, the rule applying only to a grantor and not to persons claiming through him. This principle, conceding its soundness for the sake of the argument, cannot be availed of here, for the reason that Katie Jones was one of the grantors in the deed, and the bill avers no change in the possession of the land after her husband's death such as would arrest attention and excite inquiry, but simply avers that Katie Jones has "continued in the use and possession of said property ever since, believing that she was the lawful owner thereof," and "that complainants were, at the time each of said pretended deeds of trust were made and executed, living upon said property." That Katie Jones had no title to the land at the time of the deed to Grimes is not material, for by joining in that deed she necessarily joined also in its assertion that the title to the land was by it vested in Grimes.

The second question, therefore, must also be answered in the affirmative.

Affirmed and remanded.

McCLURG v. HICKS ET AL.

[76 South. 736, Division B.]

INJUNCTION. *Sale of timber. Forfeitures. Accounting.*

Where under a contract for the sale of standing timber, defendant was to make certain improvements as a part consideration within two years or forfeit a deposit, and there was a further subsequent contract that the improvements should be made before a certain date, but not referring to the forfeiture named in the first contract, it was erroneous for the court to grant an injunction against further cutting and decree cancellation of defendant's claim before the two years for performance had expired, or, if cancellation was to be had in not awarding to defendant the consideration paid, as a consideration of cancellation, or in not ordering an accounting to see whether any sum was due defendant under the contract.

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Appeal from the chancery court of Sunflower county. Hon. E. N. Thomas, Chancellor.

Bill by Mrs. Mary Hicks and others to enjoin A. J. McClurg from cutting timber and to cancel a contract. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

C. C. Moody, for appellant.

Herring & Wiley and *J. L. Williams*, for appellee.

Ethridge, J., delivered the opinion of the court.

J. C. Andrews and A. J. McClurg entered into a contract with Frank Hicks, as agent for the appellees, under and by the terms of which contract Hicks sold to McClurg and Andrews the timber of every description, standing or down on certain lands in Sunflower and Coahoma counties, Miss. As to the tract in Sunflower county the timber was to be removed within two years from January 4, 1911, and by the terms of the contract all timber not removed within that time was to revert to the grantors; the consideration for said timber being one hundred dollars to be paid in cash on the signing of the contract, and the further consideration of clearing and putting into cultivation twenty acres of land, and the building of two substantial cabins of cypress lumber, of a character stipulated in the contract. It was provided that the clearing of the land should begin on or before the starting of the cutting of timber, and the grantee was to have the right to cultivate and retain the crops he might grow on the twenty acres during the years 1911 and 1912. It is then provided that, after the cabins are complete and the twenty acres properly cleared and fenced, the one hundred dollars held as a guaranty, is to be returned to the second party, McClurg and Andrews. If, however, the improvements as above set out are not up to the agreement herein, then the grantors may retain the one hundred dollars, or so much as is necessary to put the improvements in proper condition, and then pay

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over the remainder, if any, to the grantees. This one hundred dollars was also to guarantee fulfillment of the contract as to the land in Coahoma county.

The contract as to the land in Coahoma county, carried a sale of timber on that land for a consideration of two hundred dollars cash, the cutting of timber to begin in the year 1911, and to be cut and removed by January 1, 1913; all timber not cut and removed by that time to revert to the grantors. In addition to the two hundred dollars cash, one hundred dollars more was to be paid within ninety days after the cutting begins, and forty acres of land was to be cleared, and two substantial cabins to be erected thereon; the second party, or grantee, to begin the clearing on or before the cutting of timber, and to have the right to cultivate and reap the benefit of all crops grown during 1911 and 1912 on the described clearing.

In 1911 some deadening of timber was done upon the two tracts of land, and preliminary work to the clearing of the land begun; but it seems satisfactory progress had not been made with reference to the improvements thereon, and on the 25th of May, 1912, a supplementary contract was entered into between McClurg and Hicks; McClurg having acquired Andrews' interest in the contract prior to this supplementary contract. Under the supplementary contract it was recited that, McClurg having forfeited the right to cut the timber, by reason of nonpayment of the balance of money due, and because he had not built the houses called for in the contract, nor plowed and cultivated the land mentioned in the contract, in consideration of one dollar in cash and the promise to stop cutting timber at once, and to begin putting up the houses called for in the contract, and to begin clearing and plowing at once, and to have at least one-half of the amount called for by the original contract cleared and plowed by July 25, 1912, at which time he may begin cutting timber after the above-mentioned improvements are made, then

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the plowing and clearing to continue through the summer and fall, the clearing and plowing, being of the essence of the contract, must be done, or the timber cannot be cut; the balance of the money to be paid out of the proceeds of lumber and switch ties already cut, as the grantee gets the money out of them, the timber on the land being cleared and plowed may be cut and hauled off as the work is being done, but only on land being actually cleared.

On the 17th of August the appellees filed a bill in the chancery court, alleging that the above-mentioned contracts had been entered into, that Andrews had sold his interest to McClurg, that under the terms of said contract sixty acres of land was to be cleared and four cabins built, and one hundred dollars to be paid, and charging that this had not been done, charging, then, the execution of the contract of May 25th, above mentioned, and alleging that this contract had not been complied with, that the appellant, who was defendant below, had forfeited his right under the contract, but had refused to surrender possession of the premises and was cutting the timber on the lands, and unless restrained would continue to do so, that the appellant was insolvent, and prayed for an injunction restraining the defendant from cutting, selling, or offering for sale any of the timber mentioned, or disposing of any of the timber cut, and for the cancellation of the contract as a cloud upon the title of complainants, appellees.

The answer denied the allegations of the bill as to noncompliance with the terms of the contract, and alleged that the contract of May, 1912, was entered into, not for the purpose of varying the terms of the original contract, but to satisfy a bank at Clarksdale, which held a deed of trust upon the land, claiming that the appellees induced him to execute the contract as a guaranty to the bank that the land would be cleared in 1912.

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The injunction was granted, and after the granting of the injunction, restraining McClurg from cutting the timber, the appellees cut the timber off of the land between the granting of the injunction and the trial of the cause. On the hearing the chancellor made the injunction perpetual, and canceled the claim of McClurg under the contract, and granted the full relief prayed for in the bill, but did not order a restoration of the consideration of the amount paid, nor the return of the one hundred dollars put up as a guaranty to McClurg, nor did the court order an accounting between the parties as to the value of the timber cut by Hicks after the injunction, nor as to the value of the improvements made by McClurg upon the premises.

Inasmuch as the injunction was granted prior to the time it was stipulated that McClurg should have in which to remove the timber and to put the place into cultivation, and inasmuch as the contract of May 25, 1912, did not by its terms provide for a forfeiture of the rights of McClurg if he failed to comply with the contract by the 25th of July, 1912, but only provided that he should not cut the timber unless he made the improvements, and as the suing out of the injunction enjoining McClurg under the contract should have had the effect of keeping the matter *in statu quo* until the hearing, and if the hearing resulted favorably to McClurg, giving him the balance of the time for which he was enjoined in which to comply with his contract, we are of the opinion that the chancellor committed error in sustaining the injunction and canceling the claim of the appellant, or, if cancellation was to be had, in not awarding to McClurg the consideration paid, as a condition of cancellation, or in not ordering an accounting to see whether any sum was due McClurg under the contract, and the judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

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JOHNSON v. WESTERN UNION TELEGRAPH CO.

[76 South. 738, Division B.]

TELEGRAPH AND TELEPHONES. *Failure to deliver telegram. Exemplary damages.*

Where in a suit against a telegraph company the declaration alleged that the company wantonly and wilfully refused to deliver a telegram, exemplary damages were recoverable if the averments of the declaration were true, even though no actual damages were suffered.

APPEAL from the circuit court of Hancock county.

HON. J. H. NEVILLE, Judge.

Suit by A. R. Johnson against the Western Union Telegraph Company. Demurrer to the declaration sustained, and judgment affirmed on appeal without opinion and plaintiff filed a suggestion of error. Suggestion of error sustained, former judgment set aside and cause remanded.

Robert Genin and *H. J. Boyle,* for appellant.

Appellee contends that punitive damages cannot be recovered because no actual damages are recoverable, we seriously contend that actual damages are recoverable in a former part of this brief. And we contend that we are at least entitled to recover the cost of the telegrams appellant sent making these offers if nothing else. *Alexander* v. *Western Union, supra.* But for the sake of presenting this question in the light in which the appellee sets it out in his demurrer and presuming that his honor the circuit judge may have decided that we were not entitled to actual damages and therefore not entitled to punitive damages, we will present the matter in that light.

Our courts have repeatedly held that where a public agent such as a Telegraph Company wilfully and wantonly failed and refused to perform a duty it accepts

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to perform, it is liable in punitive damages, this rule has been announced in this state repeatedly. In all public service corporations especially in Railroad Cases. As to the recovery of punitive damages where no actual damages were suffered see *Western Union* v. *Hiller,* 93 Miss. 658, 47 So. 377; *Western Union Telegraph Company* v. *Watson,* 82 Miss. 101, 32 So. 76; *Western Union* v. *McKenzy,* 67 So. 647; *Western Union Telegraph Company* v. *Allen,* 66 Miss. So. 461.

It is true that the penalty given by statute has been declared unconstitutional, but the right to recover nominal and exemplary damages has remained the same in this state, since that decision was handed down in June, 1889.

In *Western Union* v. *Baker,* 69 So. 246, an Alabama Case, the court held that punitive damages can be recovered even though no actual damages are shown. We especially invite the court to the decision in the case *Steinberger* v. *Western Union Telegraph Company,* 52 So. 691. If the rule attempted to be invoked by the appellee is correct in this instance, all of the decisions where punitive damages have been allowed on interstate messages are wrong.

All of the cases above cited in which punitive damages were allowed, the telegrams were from one state to another. I know of no case where the court stated the rule to be that a superior officer or agent should authorize or ratify the wrong before the company is liable for punitive damages. It is useless to cite to this court decisions where our state has held that the act of any agent is the act of the company when within the scope of his authority. The appellee relied in the court below, on the case of *Telegraph Company* v. *Pendleton,* 122 U. S. 342, 7 Sup. Ct. Rep. 1126, that case was decided about the year of 1888. The Steinberger case is decisive of this question of the demurrer. There is nothing for this court to do but to reverse this case which plainly states a cause of action.

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Griffith & Wallace, for appellee.

Beginning with the hornbook texts and going on down to the last and most elaborate we find, at page 310, Hale on Damages (a students Horn-book extensively if not generally used throughout the great law schools of the country): "In most jurisdictions the doctrine has become firmly established that exemplary damages, in addition to compensation for the loss actually suffered, may be awarded as a punishment to defendant, and a warning to others. But a civil action does not lie merely to inflict punishment. Some actual loss must be proved, though in a few jurisdictions a right to recover nominal damages has been held sufficient to sustain an allowance of exemplary damages."

At page 1080 of 27 Ency. Law, (2 Ed.): "Nor are such damages (punitive damages), recoverable except where there is proof of actual damage to the plaintiff."

And again Vol. 12, Id., pages 29, 30: "It is a general rule that in order to recover exemplary damages, there must be actual damages shown, though the elements otherwise authorizing the assessment of exemplary damages may exist, or as it has otherwise been expressed, exemplary damages can never constitute the basis of a cause of action."

At page 109. of Vol. 13 Cyc: "But as a rule it must be shown by the evidence that actual damages are due," and at page 119, Id: "In assessing the amount of exemplary damages, the damages awarded should bear some reasonable proportion to the real damage sustained."

Turning now to the more elaborate standard texts: The great work Thompson on Negligence would first occur, especially if looking for the rule stated strongest for the plaintiff, and we find: 6 Thompson on Negligence, 7170; 2 Sutherland on Damages, section 406; Jones on Telegraph and Telephones, sections 611; 1 Sedgwick on Damages (9 Ed. 1912), 361; 8 Ruling Case Law, p. 593, sec. 137.

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Mr. Thompson says in his text Alabama is the one exception to the general rule, and he and the other writers all cite *Alabama, etc., R. R. Co.* v. *Sellers*, 30 Am. St. Rep. 17, and we find the facts of that case to be that the conductor having failed to stop at station "wilfully compelled the plaintiff to alight, in a driving rain, several hundred yards from any shelter, so encumbered with her child and baggage as to be unable to protect herself, and necessitating exposure to the elements while walking this distance." Here is a case of actual injury and harm; more than nominal damages could and should have been allowed, and in any event it was a case of nominal actual damages, falling under second head, *supra*. The authority of a decision is the result reached under the facts, not all the talk in the opinion.

The case *Hansley* v. *Jamesville, etc., R. Co.*, 117 N. C. 565, 32 L. R. A. 551, is cited by one text as supporting the supposed minority doctrine, but on examination it is found that punitive damages were disallowed altogether in that case. Also *Sanders* v. *Gilbert*, 156 N. C. 463, 38 L. R. A. (N. S.) 404, is cited, but we find that case really a direct authority for the rule contended for by us. It was a case where the plaintiff was pursued by defendant a member of a mob, and driven inside his home, and was shot at with a pistol by defendant while therein. It was a case where a grievous strongly and in forcible language to the actual harm and damage done. The Missouri cases will be noted further along.

All these cases, and we submit that every case from any court of last resort supposed to uphold appellant's contentions, will be found to come under the second head and kind respecting nominal damages as above set out herein—that is to say under head nominal actual damages.

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The following Mississippi cases have sometimes been cited to lower courts within our observation as sustaining the contrary of the rule we here contend for. *Goings* v. *Robinson et al.*, 63 Miss. 500.

This case on the contrary was that a wilful trespass, a forcible physical invasion of plaintiff's rights, and the court says "the evidence discloses a real injury, although uncertain in extent." It is exactly in line and peculiarily illustrative of the very doctrine and distinction we are endeavoring to make plain in this brief. *Steinberger* v. *West. Union*, 97 Miss. 260; *Ellzey* v. *W. U. Tel. Co.*, 102 Miss. 691.

So in every Mississippi case where punitive damages have been allowed against telephone or telegraph companies. *Watson Case*, 82 Miss. 101, death message, and actual expenses; *Hiller Case*, 93 Miss. 658, sick message and traveling expenses; *Dodson Case*, 98 Miss. 745, death message similar to *Guess Case; Walters Case*, 63 So. 194, death message similar to last two; *Christian Case*, 59 So. 933, actual personal harm, inconvenience and suffering; *Pittman Case*, 66 So. 977, death message, and these are the only ones we are now able to find.

We have heard the following cases from other states cited as being against our contention herein: *Jacob Lambert* v. *Judge & Dolf Drug Co. et al.*, 238 Mo. 409, 37 L. R. A. (N. S.) —; *L. & N. R. R. Co.* v. *Smith*, 37 So. 490, and *Goodson* v. *Stewart*, 46 So. 239.

These cases are both of malicious trespasses on real property over the written protest of the owner. They are the kind of cases where the law presumes actual damages beyond nominal, it is a real injury. Also the South Carolina case of *Fields* v. *Lancaster*, 58 S. E. 608, which is a case of assault and battery; *Doster* v. *Telegraph Co.*, 77 S. E. 56, 57 S. E. 671; *Watts* v. *Railroad, Company*, 60 S. C. 67; *Press Pub. Co.* v. *Monroe*, 19 C. C. A. 429; *Hefley* v. *Baker*, 19 Kan. 9; *Schippel* v. *Norton*, 38 Kan. 567, 16 Pac. 804; *Adams* v. *Salins*, 58 Kan. 246, 48 Pac. 918;

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Bank v. *Grain Co.*, 60 Kan. 30, 55 Pac. 277; *Cole* v. *Gray*, 70 Kan. 705, 79 Pac. 654; *Sondegard* v. *Martin*, 111 Pac. 442; *Stonestreet* v. *Crandall*, 10 Kan. App. 575, 62 Pac. 249; *Flannagin* v. *Womack*, 54 Tex. 45; *Giraud* v. *Moore*, 86 Tex. 675, 26 S. W. 945; *Trawick* v. *Martin*, 79 Tex. 460, and *Jones* v. *Matthews*, 75 Tex. 1.

We will not extend this brief by citations and comments at large on the long line of cases from the great number of states supporting the view contended for by us. They are, many of them, cited in the notes to the several texts we have quoted, *supra*, some of these cases so cited by these texts and additional ones may be found in great numbers in 15 Cent. Dig. Damages, 191; 7 Dec. Dig, Damages, 87 (2); and in the American Annual Dig. Key Number, 87.

COOK, P. J., delivered the opinion of the court.

PER CURIAM, *Affirmed.*

ON SUGGESTION OF ERROR.

This was an action for the alleged failure of the Western Union Telegraph Company to deliver a certain telegram addressed to appellant and delivered to the telegraph company at its office in Louisville, Ky., to be transmitted and delivered to appellant at Bay St. Louis. The declaration charges that the telegram was not delivered, although the appellant called at the Bay St. Louis office of the company and inquired about the telegram, and was informed that no telegram had been received, addressed to appellant. The declaration avers that plaintiff suffered actual damages in the way of profits on account of defendant's failure to deliver the telegram, and also charges that the defendant company negligently, willfully, and wantonly failed to deliver the telegram, and demands punitive or exemplary damages. To this declaration a demurrer was interposed and sustained by the trial court, and plaintiff appealed to this court. On a former

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day of this term the judgment of the trial court sustaining this demurrer was affirmed without an opinion. This case is again before us on suggestion of error.

When the case was first presented to us, and in its consideration, our attention was specially directed to the question as to whether the declaration made out a case for actual damages, and we then thought that the several telegrams which it was alleged passed between the plaintiff and certain parties in Louisville did not make out a case of actual damages. In other words, the several telegrams did not close a contract between the sender and the prospective purchaser; but, at best, it could only be said that the plaintiff may have lost an opportunity to close a contract if the telegram had been delivered. The several telegrams did not amount to a tender and acceptance of a proposition to sell and buy. *Telegraph Co.* v. *Criscoe,* 107 Miss. 37, 64 So. 933. We still adhere to that view.

It remains to decide whether plaintiff was entitled to exemplary damages, if the averments of his declaration are taken as true. The declaration states that the defendant wantonly and willfully refused to deliver the telegram. In many jurisdictions the courts of last resort have decided that, in the absence of actual damages, exemplar damages are not recoverable. But this court is committed to a contrary view in *Steinberger* v. *Western Union Telegraph Co.*, 97 Miss. 260, 52 So. 691. The suggestion of error is therefore sustained, and the former judgment will be set aside, and the cause remanded for further proceedings.

Reversed and remanded.

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TOWN OF CRENSHAW v. PANOLA COUNTY.

[76 South. 741, In Banc.]

1. HIGHWAYS. *Taxation. Distribution by counties. Code* 1906, *sections* 4443-4469.

The statutory scheme, Code 1906, section 4443, relating to the levy of road taxes by a board of county supervisors and section 4469, relating to the road fund, contemplates that the board of supervisors shall supervise the distribution of the funds otherwise there would be no record thereof.

2. LIMITATION OF ACTIONS. *Municipal corporations. Constitutional provisions.*

Under section 104, of our Constitution, so providing, the statute of limitations does not run against municipal corporations and this is true although the suit be by a town against a county.

3. HIGHWAYS. *Road tax. Liability to town. Amount.*

Under section 4443, Code 1906, authorizing a county to levy a road tax on all the taxable property of the county and section 4469, providing for the distribution of the road fund, a county collecting a road tax on property within the corporate limits of a town and which had not spent any of the money on working the streets of the town must pay over to the town one half of the road taxes collected therein.

4. COUNTIES. *Judgment against. Enforcement.*

The mere authorization of suit against a county does not imply necessarily, a means of enforcement of a judgment therein obtained. When a judgment is rendered against a county, it is the duty of the board of supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power, it is their duty to levy a tax for that purpose but if they have no funds, and the power to levy the tax has not been delegated to them, such tax cannot be levied without express legislative authority.

APPEAL from the circuit court of Panola county.

HON. E. D. DINKINS, Judge.

Suit by the Town of Chenshaw against Panola County. From a judgment of the circuit court reversing a judg-

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ment of a justice of the peace in favor of plaintiff and dismissing the case, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Shands & Montgomery, for appellant.

We respectfully contend that the statute of limitations of six years did not apply in this case, and that the claim was not barred by reason of any limitation fixed by statute. Section 104 of the Mississippi Constitution reads as follows: "Statutes of limitation in civil causes shall not run against the state, or any subdivision or municipal corporation thereof."

Upon a proper construction of this section of the Constitution, in my judgment, the decision in this case rests. Words in the Constitution are to be taken in their plain and obvious sense, and when this sense is clear, no resort can be had to construction. *Smith* v. *Halfacre,* 6 Howard, 582; *Brien* v. *Williamson,* 7 Howard, 14.

It seems to me that this provision of the Constitution is so plain as to eliminate from consideration the question of the applicability of the statute of limitations in this case. The Constitution says in the plainest, simplest language, that the statute of limitations in civil causes shall not run against a municipality. No amount of argument or discussion could add anything which would make the meaning of this clause in the Constitution clearer.

Section 3096, Code 1906, provides that statutes of limitation in civil causes shall not run against the state or any subdivision or municipal corporation thereof; but all such statutes shall run in favor of the state, the counties and the municipal corporations therein."

The Constitution is of course the supreme law of the state of Mississippi and where a conflict exists between a provision in the Constitution and a statute, the constitutional provision controls. The court in construing

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a statute, will, if possible, give to it such a construction as will render it constitutional.

If the court in this case construes the clause in section 3096, "but all such statutes shall run in favor of the state, the counties, and the municipal corporations therein," to mean that the county may successfully plead the statute of limitations against the town, then this statute is repugnant to section 104 of the Constitution, because the Constitution clearly provides that the statute of limitation shall not run against a municipality, and make this provision without qualification.

But section 104 of the Constitution controls this question in this case, and we rest the decision of this question upon a construction of its plain, simple announcement, that statute of limitation shall not run in civil causes against a municipality. We can add nothing by way of argument which could make the provision plainer.

The court will view the facts of this case from a practical view point. The county, through its tax collector, was the only legally constituted authority for the collection of this tax; the town could not collect it. It was the duty of the county to distribute or divide this road fund with the town immediately upon receipt thereof, under sections 4443 and 4449 of the Code of 1906. Immediately upon the collection of the tax, the county became the debtor of the town to the extent of one-half of the road tax so collected. It is always the duty of the debtor to seek the creditor and pay him, rather than to compel the creditor to seek the debtor and demand payment of the debt.

Whether the money was turned into the road fund and expended in the working of the various roads of the county, or not, was a matter over which the town had no control whotever. The county collected the money, and was legally obligated to pay one-half thereof over to the town; the town had no authority to direct the appropriation of the fund in any manner; and so far as the town

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was concerned, the county had the right to make whatever disposition it desired to make of the fund. But the fact that the county deposited the money so collected to any particular county fund, and used it for any particular purpose, could not possibly operate as a payment or discharge of its legal liability to the town for one-half of the money collected and due to the town.

It is not shown here that the town of Crenshaw had any knowledge whatever as to what the county did with the money so collected. The fact that the county used the money in working of the various county roads, outside the corporate limits of the town of Crenshaw, did not discharge its obligation to the town to pay to it the amount legally due to it. The county was legally obligated to pay into the treasury of the town for account of the town street fund one-half the taxes collected on the taxable property within its corporate limits for road purposes and when the tax was collected by the county, it become the debtor of the town to that extent.

I respectfully submit that section 104 of the Constitution prohibits the running of the statute of limitations against the town in this case; and that the learned trial judge was in error in deciding this case in favor of the county. I submit that the judgment of the lower court should be reversed, and judgment entered in this court for the sum demanded, less commissions due to sheriff for collection, with all lawful interest and costs.

L. L. Pearson and *John Kyle,* for appellee.

Two defenses were interposed on the trial of this case in the lower court, to wit: the statute of limitations and special matter set up under the plea of general issue.

As to the first plea of the statue of limitations: It is urged that this plea cannot be sustained because of the provision of section 104 of the Constitution. It is the contention of the county that this section of the Con-

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stitution was never intended to operate as an inhibition against a department of the government pleading the statute against another department of government, but was intended solely to prohibit the legislature from authorizing private parties to plead statutes of limitations to defeat a right of action vested in the government. We have been unable to find any authority on this point, and so far as our investigation has gone, no case involving this point has ever been decided in this or any other state. But in support of this plea we refer to the very clear opinion of the circuit judge which has been made a part of the record on this appeal.

The defense made under the plea of the general issue with notice must unquestionably be sustained. It is our opinion that the tax collector, in making his settlement, should pay over to the municipality directly its half of the *ad valorem* road taxes collected by him. If he does not do this, however, the money, so long as it remains in the county treasury, may be recovered from the county authorities. But if the money is not claimed while it is in the custody of the county authorities and no demand is made for it while it is in fund, then the municipality is clearly estopped by their own conduct from coming into court years afterwards and undertaking to establish a claim against the general county fund for the amount of road money which they could have demanded and expended under the direction of the municipal authorities for working their streets, but which they allowed to remain in the county road fund and be expended by an old board of supervisors years before, the agreed statement of facts in this case show that no part of the money received for *ad valorem* road taxes for the years 1907 and 1908 was ever placed to the credit of the general fund of the county and that at the time demand was made for the amount herein sued for, not a dollar of it was in fund, but all of it had been long since expended for working roads in the various parts of the

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country including those leading into the town of Crenshaw.

The statute has provided two governing bodies for the disbursement of the *ad valorem* road tax, to wit, the county board of supervisors and the board of aldermen of the municipality. The fund created by the levying of this special road tax is a special fund to be used for the purposes which the statute defines and for no other purposes. One of the governing bodies charged with the duty of expending the money has stood idly by and allowed the other governing body to expend it all, not for any illegal purposes but for the purpose for which the fund was created; this being true the municipality of Crenshaw cannot at this late date come in and undertake to assert a general claim against the county.

The case made on this appeal is one of first impression in this court and the amount involved herein is relatively small, but the decision of the court on this appeal is a great consequence, because of other cases involving the same legal points but much larger amounts of money are now pending in the various counties of the state. As pointed out by the learned counsel for the appellant, the leading authorities I wish to call the court's attention to are two Florida cases, the first of which was referred to specifically in the brief for the appellants. The policy of the law of that state and the wording of the statutes in that state are in effect identical with our own. In the case of the *City of Sanford* v. *Orange County*, 45 So. 479, the plea and defense herein made was upheld by the court in language most convincing and while the word laches was used in the opinion of the court, the real defense was an estoppel against making demand under the circumstances. But counsel for appellant in their brief have pointed out several reasons why they claim the decision in that case cannot control here. They argue that the case above cited was an equity case and not a law case and that the court rested its decision on the fact that the city was in laches and that laches cannot be

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maintained as a defense in a law court. As a conclusive answer to these arguments I wish to cite the case just decided by the supreme court of Florida, *Pippin, et al., County Commissioners*, v. *State, ex rel. Town of Blountstown*, 74 So. 653. This latter case shows that the defense was sustained in a law court and that the city was estopped to claim the funds under facts identical with those we have before us, and the court went so far as to state that the payment of the claim therein sued for would be a violation of the law.

Now, in conclusion, let us notice especiall the language used in the statute upon which the claim herein sued upon is founded. Section 4443 of the Code provides that: "The taxes so collected on property within a municipality, the streets of which are worked at the expense of the municipal treasury, or worked by municipal authority, shall be equally divided between the county road funds and the municipal street fund." Section 4469 provides as follows: "One-half of the *ad valorem* tax collected on property within a municipality shall be paid over to the treasurer thereof, in cases where the streets are worked at the expense of the municipal treasury, or worked by municipal authority, and all other *ad valorem* taxes collected shall be paid to the county treasurer, and used by the board of supervisors as a general road fund within such portion of the county as is worked by contract." Thus we see that section 4443 provides that the taxes thus collected on property within the municipality shall be equally divided between the county road funds and the municipal street fund. The statute does not state who shall make the division, but the natural deduction is that it should be thus divided by the authority who collects it, to wit, the tax collector. This idea is strengthened by the language employed in section 4469. If this money is all paid into the county road fund, as is, probably the universal custom, we admit that the municipality upon timely demand made while the portion to which is entitled is in fund can have its part paid over to the munici-

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pal treasury. But the statutes above quoted do not confer a general creditor's right upon the municipality against the county, which can be enforced against the general funds of the county. The right is limited exclusively in this case to the one-half of the *ad valorem* road taxes collected within the municipality during the years 1907 and 1908. It is a right to a specific fund, and that right has become worthless, because the municipal authorities stood idly by and allowed the fund to be expended, rightfully or wrongfully, it matters not which, by the old board of supervisors.

The judgment of the lower court holding that the municipality was estopped to come in and undertake to establish a general claim against the general funds of the county. Under the facts developed, this case is correct, and that judgment should be affirmed.

COOK, P. J., delivered the opinion of the court.

This suit was begun in the court of a justice of the peace of Panola county. The cause of action is thus stated:

Town of Crenshaw v. Panola County.

Panola County, Mississippi, Dr., to the Town of Crenshaw, a Municipality.

To one-half of one-mill road tax collected on property within the corporate limits of said town of Crenshaw for the year 1907.....$102.21

To one-half of one-mill road tax collected on property within the corporate limits of said town of Crenshaw for the year 1908..... 96.49

$198.70

Judgment was rendered by the justice of the peace in favor of the plaintiff, the town of Crenshaw, and the defendant, Panola county, appealed to the circuit court, in which court the judment of the justice of the peace

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was reversed, and the case dismissed. From this judgment the town of Crenshaw has appealed to this court.

The case was submitted to the learned circuit judge upon an agreed statement of facts as follows:

"In this case it is agreed that the following constitutes an agreed statement of facts:

"That during all the years 1907 and 1908 the town of Crenshaw was a duly constituted municipal corporation, situated in said county and state of Mississippi, and that during all of said years 1907 and 1908 the streets situated within the corporate limits of said county were worked wholly at the expense of the treasury of said municipality and by the municipal authority of said town, and that the county of Panola did not work on any of the streets of said town, nor paid any part of the expense of working the streets situated within the corporate limits of the said town, during either of the said years.

"That the board of supervisors of Panola county, acting under the authority of section 4443 and other similar provisions of the Mississippi Code of 1906, levied a one-mill *ad valorem* tax upon all taxable property in said county of Panola, including the taxable property situated within the corporate limits of said town of Crenshaw, for each of said years 1907 and 1908, and the tax collector of said county of Panola collected said one-mill *ad valorem* tax upon all of the taxable property situated within the corporate limits of said town of Crenshaw for each of the said years 1907 and 1908, the gross amount of said one-mill tax levied and collected for the years 1907 being two hundred and four dollars and forty-two cents, and the gross amount of said taxes collected for the year 1908 being one hundred and ninety-two dollars and ninety-eight cents; that said taxes was not divided between the county road fund and the municipal street fund of said town of Crenshaw, and no part thereof was ever paid over to the said town of Crenshaw, and no part thereof ever received by it.

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"That all of said above-described taxes for each of the years of 1907 and 1908, less the commission allowed to said tax collector, which on the amount herein sued for is agreed to have been six dollars and fifty cents, were by the tax collectors of said county of Panola turned over to the county treasurer and placed to the credit of the separate road fund of said county along with the other *ad valorem* road tax levied and collected as above, and were by the proper officers of said county expended for the working of the public roads of said county throughout said county of Panola, including the public roads leading to and about the said town of Crenshaw, but not including any roads or streets within the corporate limits of said town of Crenshaw; that said amounts have long since been expended by said county of Panola, and that no demand was ever made by the said town of Crenshaw upon the said count for the payment over to it of any part of said fund until sometime in the year 1915; that no part of said funds is now in the county treasury, and no part of said funds was in the county treasury at the time of the presentation of the claim by the said town of Crenshaw to the said county for payment; that none of the amounts sued for were ever placed to the credit of the general funds of said county of Panola.

"That the said town of Crenshaw duly presented a claim in writing to the board of supervisors of said county of Panola for said amounts sued for, which claim was by the said board of supervisors declined; all of which was done before suit was instituted.

"This statement and agreement of facts shall not prejudice in any way the right of defendant county to object to the jurisdiction of the court, or to ask that same be transferred to the chancery court."

We here copy the opinion of the judge, viz.:

"In the decision of this case there are two important questions to be considered, i. e.: (1) Whether or not section 104, Constitution of Mississippi, applies to suits between a county and a municipality, a county and the

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state, or where the interest of any two of them may conflict; or (2) whether or not a municipality, entitled to a moiety of road taxes collected by the provisions of sections 4443 and 4469, Code of 1906, may, without protest, see the entire tax paid over to the county treasurer, and by him credited to the separate road fund of the county, and all of it expended by the proper authorities of the county in working the county roads, including those of the particular district in which the municipality is situated, and even upon those roads leading into the municipality, and then, after the lapse of years, sue for and recover of the county its pro rata share thereof.

"Under the Code section referred to, I think the tax collector should account directly to the municipality whose streets are worked at the expense of the municipal treasury for their part of the fund collected, and thus save any conflict or confusion that might result from payment thereof into the county road fund, against which, under our present deplorable credit system, warrants might be outstanding that would consume the entire amount; but the question is not involved here.

"This suit is for the taxes collected for the years 1907 and 1908, the collection, amount, and appropriation of which to the county roads is agreed upon, and that no demand whatever was made therefor until some time in the year 1915, when, the same being rejected by the board of supervisors, the town of Crenshaw sued the county of Panola before a justice of the peace, where a plea of the six-year statute of limitations and the general issue, with notice, was interposed, and from whose decision an appeal was taken to this court.

"I have made diligent search for some authority to assist me in determining what, if any, application section 104 or the Constitution and section 3096, Code of 1906, should have to a suit by a municipality against a county, but have not been able to find anything bearing, even remotely, upon the question, but it is in my opinion

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that section 104 of the Constitution was intended solely to prohibit the legislature from authorizing the statute of limitations to run against the state, counties, and municipalities so far as only individuals and private corporations were concerned, and that there was no purpose to deal with the question where a conflict between the beneficiaries of the provision might be involved.

"Taking this view of the section 104, and recognziing the principle that statutes of limitations do not run against the state or county unless expressly so intended as to them, and that general statutes of limitation do run against municipalities, I conclude that the plaintiff here, the town of Crenshaw, is barred by the six-year statute.

"Considering the second question raised by this record, my attention is called to the decision of the supreme court of this state in *Holly Springs* v. *Marshall County,* 104 Miss. 752, 61 So. 703, but I am not convinced that it has any application at all to the facts in this case. There it is not shown that the municipality had not protested against the payment of the taxes into the general road fund, or against expenditure thereof, or that the amount was not then in the county treasury, or that there had been any delay in making the demand, all of which is perfectly clear here.

"To permit a municipality. even in ignorance of its rights, being entitled to one-half of the *ad valorem* road taxes collected under the provisions of the statutes referred to, to stand quietly by and see the county authorities receive and expend the whole fund upon roads, some of which lead into the town, and then, after the lapse of six years, during which it may be that the very expenditure had contributed as much to its upbuilding as if made upon its streets, to maintain a suit against the county for such taxes, is equivalent to approving the demand for the return or value of a thing given away that had been consumed in the presence of the giver and

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is opposed to the rule, as expressed in 37 Cyc. 1178, prohibiting the recovery of taxes voluntarily paid.

"My attention is called to the case of *City of Sanford* v. *Orange County,* 54 Fla. 577, 45 So. 479, which, so far as the facts are concerned, is hardly distinguishable from the case presented here, and in which it was held that no recovery could be had against the county which had received and expended the fund. The decision there, however, is grounded upon the laches of the city in not protesting against the use of the funds and in making no demands for it until after it had been expended, and the suggestion is made that, if the money had been in fund the proper remedy was *mandamus.*

"I cannot accept the grounds upon which the Florida court based its decision, i. e., laches, as our statutes of limitation must alone be looked to in such cases, but without any statute of limitation (which in my opinion we have that it applies in this case) I think that the plaintiff is estopped by its conduct now to assert any claim to the fund. Let the judgment be for the defendant."

It will be observed that the trial judge was of opinion that sections 4443 and 4469 contemplated that the tax collector should account directly with the municipality, but he also says that this question was not involved. Counsel, however, make the point that the statutes put the duty upon the tax collector, and that the county cannot be held liable for the mistakes of the collectors.

It is our opinion that the statutory scheme contemplates that the board of supervisors shall supervise the distribution of the funds; otherwise there would be no record thereof. Section 104 of our Constitution expressly provides that the statutes of limitation shall not run against municipal corporations. The plaintiff in this case is a municipal corporation, and we can find nothing in the Constitution to warrant the exception sought to be made in this case. The county could, of

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course, invoke the statute against a natural person or private corporation, but the Constitution closes the door when the plaintiff is a municipal corporation.

The attorney for the county cites *Pippin et al.* v. *Town of Blountstown,* decided by the supreme court of Florida, and reported in 74 So. 653, as conclusive against the municipality. We think the opinion in that case is entirely sound, but it will be noted that the town in that case instituted a proceeding in *mandamus,* while the case at bar is not a *mandamus* proceeding, but is a case to recover money from the county which it had wrongfully received and expended. In the *Florida Case, supra,* the county manifestly could not pay over the money received by it, because it had been expended. It would, of course, be a vain thing to order the county to pay over to the town certain money which it did not possess.

In the consideration of this case, it must be borne in mind that this is not an action by which it is sought to require the county to pay the claim, but it is an action to review the action of the board of supervisors rejecting the claim. This court, in *Holly Springs* v. *Marshall County,* 104 Miss. 752, 61 So. 703, expressly decided the precise question presented by this appeal. In other words, it was there decided that the county must pay over to the city one-half of the road taxes collected by the county. That was a suit to establish the liability of the county, and so is the present suit. The case cited was not a *mandamus* proceeding to require the county to pay, and neither is this a suit to require payment; it is merely a suit to establish liability. When it comes to collection, an entirely new question will be presented. The question will then be: Will the court issue its mandate commanding a payment of the judgment?

In *Holly Springs* v. *Marshall County, supra,* the court rendered its judgment for the money received by the

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county which, by the statute, belonged to the city; and the same judgment is demanded in this case.

The rule here considered is thus stated in Ruling Case Laws, vol. 7, p. 967:

"The mere authorization of suit against a county does not imply, necessarily, a means of enforcement of a judgment therein obtained. When a judgment is rendered against a county, it is the duty of the commissioners to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power, it is their duty to levy a tax for that purpose, but if they have no funds, and the power to levy the tax has not been delegated to them, such tax cannot be levied without express legislative authority."

The town in this case should have had judgment; the facts are undisputed. When it comes to enforcing payment, we will consider the question argued below and here. This question is not now before us.

Reversed, and judgment here.

SMITH, C. J. (dissenting.)

I am of opinion: First, that a county has no power to divert, either directly or indirectly, money collected by taxation for general county purposes to the building and maintenance of public roads; second, since it appears from the declaration that road funds here sued for have been spent by the county, it can only pay the judgment here rendered by diverting to that fund money collected by taxation for general county purposes; thereby doing indirectly what I am clearly of the opinion it could not have done directly. From which it follows that I am of the opinion, third, that no judgment should be rendered against the county herein, and that the judgment of the county court below should be affirmed.

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It does not appear from the agreed statement of facts on which the case of *Holly Springs* v. *Marshall County*, 104 Miss. 752, 61 So. 703, was tried whether or not the county at the time of the institution of the suit still had on hand the city's claimed proportion of the road tax collected by the county, so that the question here under consideration not only did not then arise and was not referred to in the opinion of the court, but, on the contrary, it was expressly eliminated by the agreement of counsel that the amount sued for "should be paid to the city, unless the election by the county to come under the provisions of chapter 150 of the Laws of 1910 repealed sections 6 and 7 of chapter 119 of the Laws of 1910 and section 4469 of the Code of 1906." That case therefore is no authority for the holding of the majority here.

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Where a child was adopted in the state of Kentucky, under whose laws it inherits land from its adoptive parent, and upon its decease in infancy without issue the land so inherited reverts to the next of kin of such adoptive parent, such inheritance rules do not violate the Constitution or public policy of Mississippi, and will be applied to lands situated in this state. *Brewer v. Browning*, 358.

ADJOINING LANDOWNERS.

1. *Waters and watercourses. Surface water. Protection. Adjoining owner.*

When adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rain water in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. "One must so use his own as not to unnecessarily injure others." *Holman v. Richardson*, 169.

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ADJOINING LANDOWERS—Continued.

2. *Same.*

Where two methods of disposing of such water are available to the owner of the lower lot, each equally efficaceous and neither requiring an unreasonably greater expense than the other, one of which will damage the adjoining property and the other will not, the latter must be adopted by the owner of the lower lot in fending the water therefrom. *Holman v. Richardson*, 169.

3. *Surface water. Right of owner of lower adjoining lot.*

The owner of a lower adjoining lot has no right to prevent surface water from crossing her lot in a diffused state by means of a brick wall, causing it to pond on a higher lot, where at no greater expense she can fully protect herself by digging a ditch across her lot to a public drain, and at the same time inflict no damage on the higher lot, though she has the right to maintain such brick wall if she takes reasonable care to prevent the water ponding on the higher lot. *Ib.*

4. *Water and watercourses. Prescription. Drainage. Knowledge of use.*

The owner of a higher lot could not acquire a prescriptible right to collect surface water in underground drains and cast it over and across a lower lot through a ditch to a public drain, where such underground tile drains on the higher lot were unknown to the owner of the lower adjoining lot, and where their existence in the nature of things were not open and notorious. *Ib.*

5. *Waters and watercourses. Surface water. Damages.*

Where an underground tile drain on a higher lot did not cause any more water to collect and flow through a ditch upon an adjoining lot, than would have done without such drain, the owner of the lower lot cannot complain of its existence. *Ib.*

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Principal and surety. Release of sureties.

Where a promissory note with a surety, executed for two hundred and twenty dollars, twenty dollars of which being for illegal interest, was changed by the principals with the consent of the payee to two hundred dollars without the knowledge of the surety, in such case the surety was released but the principals were still bound. *Runnels v. James*, 607.

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AMICUS CURIAE

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Under Code 1906, section 1055, providing that every dealer in live stock who shall fail to enter in a book the names of all persons from whom he buys, and a description by marks and otherwise of all animals bought or kept by him for slaughter, shall be punished, an indictment, charging that accused, then and there being a dealer in live stock, unlawfully failed to keep any record of stock bought or sold, and thereby did not enter the names of all persons from whom he bought such stock and a description by marks and brands or otherwise of all animals bought, is insufficient, where it was not alleged that defendant in fact bought cattle, sheep, etc., and failed to register the names of the persons from whom he bought them. *State v. Edwards*, 704.

APPEAL AND ERROR.

1. *Review of chancellor's decree disapproving railroad commission's orders.*

The decree of a chancellor, disapproving the orders of the railroad commission, requiring the erection of a railroad depot, will be given the same force and effect by the supreme court on appeal as other decrees by the chancellor, and if there was testimony upon which the chancellor could have made his decree, his findings will not be disturbed on appeal. *Miss. R. R. Comm. v. Mobile & O. R. Co.*, 101.

2. *Appealable orders.*

Notwithstanding, section 147 of the Constitution, which provides that no judgment or decree in any chancery court shall be annulled or reversed for want of jurisdiction or from any error or mistake as to whether the cause was of equity or common-law jurisdiction, an order of the chancellor sustaining a demurrer to a bill and ordering its transfer to the circuit court is appealable. *Robertson, Revenue Agent, v. F. Goodman Dry Goods Co.*, 210.

3. *Exclusion of testimony. Matters not in record.*

The supreme court on appeal cannot review the exclusion by the court below of the testimony of a witness where, while the record discloses the question sought to be propounded to the witness, it does not disclose what his answers thereto would

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APPEAL AND ERROR—Continued.

have been so that the courts may judge of the materiality and relevancy thereof to the issue being tried, and if material, whether appellant was prejudiced by the exclusion thereof. *N. O. & N. E. R. Co. v. Scarlet*, 285.

4. *Law of the case.*

The well recognized rule that the court ordinarily after having laid down principles governing a case on one appeal will not review its holdings on a subsequent appeal but will ordinarily adhere to its former decision and not inquire into its correctness, is not so fixed and binding upon the court, that it may not depart from its former decision in a subsequent appeal, if the former decision in its judgment is clearly erroneous and would lead to unjust results and especially where no rights have accrued in reliance upon its former decision. *Brewer v. Browning*, 358.

5. *Stenographer's notes. Order extending time. Validity. Statute.*

Under chapter 111, Laws 1910, section 797, par. D. the trial judge has the power to extend the time within which a stenographer may file a transcript of the evidence sixty days in addition to the original sixty days allowed him therefor by the statute, and an order granting an extension of more than sixty additional days was valid to the extent of the additional sixty days which the judge had the power to grant. *Met. Casualty Ins. Co. of N. Y. v. Sullivan*, 399.

6. *Same.*

The statute also provides that in case the stenographer failed to file a transcript the appellant should have forty days after the expiration of the sixty days allowed the stenographer by law or after the expiration of any extension of time lawfully granted, in which to prepare and present to the judge a bill of exceptions in the case as if there had been no stenographer therefor, and in such case as an order granting the stenographer more than sixty days additional was valid to the extent of sixty days additional time, a bill of exceptions filed within forty days after such sixty days additional time complied with the statute, and would prevent the bill of exceptions from being stricken from the record. *Ib.*

7. *Action on account. Pleading. Amendment during trial. When proper.*

Where in a suit upon an open account objection was made that one part of the account was not itemized it was reversible er-

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ror for the court not to allow the plaintiff to amend the account so as to properly itemize the same. *So. School Book Depository v. Donald*, 465.

8. *Garnishment. Answer. Sufficiency. Statute.*

Where the answer of the garnishee requested permission to file amendments thereto at a later day thereby continuing the case in court until it should be disposed of in a proper manner, it was not necessary for exceptions to have been filed at the same term at which the answer was filed. *Mechanics & Traders Ins. Co. v. Butler*, 476.

9. *Sale. Breach. Remedies.*

In such case where, after judgment in the court below and pending an appeal to the supreme court, the seller had the goods involved in the suit and tendered to the buyer, removed from the warehouse of the common carrier, and returned to them and converted said goods to their sole use and benefit without the knowledge or consent of the buyer, the supreme court on motion will set aside its order entering judgment in that court and reverse and remand the cause. *Walker Bros. & Co. v. Daggett*, 657.

10. *Record. Conclusiveness.*

The recitals in a judgment, on appeal therefrom, must be supported and are controlled by the record. *Hattiesburg Hardware Co. v. Pittsburg Steel Co.*, 663.

11. *Review. Reversal.*

Under Code 1906, section 2683, so providing, suit may be brought against one, some or all of persons jointly and severally liable, and since partners are jointly and severally liable, error in rendering judgment against several partners, two of whom were not served with process and did not appear, does not require a reversal as to the partner who was served, in view of section 4944, providing that one appealing party is not entitled to a reversal for error as to another party defendant. *Ib.*

12. *Homicide. Manslaughter. Sufficiency of evidence.*

Under the facts as set out in its opinion, the court held that the trial court should have set aside the verdict and granted defendant a new trial because the verdict was contrary to the overwhelming weight of the testimony. *McNeal v. State*, 678.

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APPEAL AND ERROR—Continued.

13. *Scope of review. Conflicting evidence.*

Where there is a distinct conflict in the evidence which might well have been resolved either way, the verdict of a jury will not be disturbed on appeal, unless the jury were improperly instructed as to the law of the case. *Mardis v. Y. & M. V. R. Co.*, 734.

14. *Trial. Instructions. Preponderance of evidence.*

Where in a suit by a property owner for damages by fire alleged to have been caused by sparks from defendant's locomotives, the evidence would have warranted a finding for either party, it was error for the court to instruct the jury to find for the defendant, if the evidence left them in doubt and uncertain as to the cause of the fire, or whether the fire was caused by defendant's locomotive or some other person. *Ib.*

APPEARANCE.

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ARGUMENT OF COUNSEL.

Trial.

The fact that the plaintiff's counsel in his closing argument to the jury spoke of defendants' instructions as "these little, old, trickey, catchy instructions given for the purpose of misleading an honest jury," while highly improper, was not reversible error. *Ulmer v. Pistole*, 485.

ARSON.

Corpus delicti. Evidence. Sufficiency.

The *corpus delicti* in a case of arson consist, not only in the proof of the burning of the house or other things burned, but of criminal agency in causing the burning. *Rayborn v. State*, 730.

ASSESSMENT.

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ASSIGNMENTS.

1. *Mechanics lien. Liens of materialmen and laborers. Rights of assignee of contractor.*

Under Code 1906, section 3074, giving to sub-contractors materialmen and laborers, a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an as-

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signee of the principal contractor has the prior right to the fund as against sub-contractors, materialmen and laborers, serving notice after the assignment, though the assignee does not give the lien claimant notice of his assignment. *Strickland Lumber Co. v. Rheinhart*, 749.

2. *Mechanics lien. Materialmen. Rights of assignee of contractor. Partnership. Evidence. Admissibility.*

In a suit by a materialman to enforce his lien upon money paid into court by the owner as still due the principal contractor, where it was charged that the assignee of the principal contractor, was in fact in partnership with him it was error to exclude the evidence of partnership since if it was a partnership the purported assignee would be subordinated to all of the other claims for material and labor, though the notice of such other claimants were served after the assignment. *Ib.*

ATTACHMENT.

1. *Pleading. Variance.*

On the trial of an action of attachment, the plaintiff in order to succeed must sustain his alleged ground of attachment, and it will not help him to prove other grounds of attachment not alleged in his affidavit for attachment. *Terry v. Jolly*, 26.

2. *Wrongful issuance. Evidence. Sufficiency.*

Under the facts set out in its opinion in this case the court held that the court below correctly sustained a peremptory instruction for the defendant that the attachment was wrongfully sued out. *Turner v. Crane*, 134.

3. *Wrongful issuance. Damages. Excessive damages.*

Where on a writ of inquiry to assess the damage sustained by a defendant because of the wrongful suing out of an attachment against a vacant lot, the only testimony relating to any actual damages was that of defendant himself that he had some inquiries to sell the lot, and also some conversation with a gentleman about building a house thereon, but that he was unable to do either, because of the suing out of the attachment and the levy on the lots. These damages were too remote and speculative upon which to base a recovery, but in such case a recovery of attorney fees was correct. *Ib.*

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ATTORNEY FEES.

See DAMAGES.

AUTOMOBILES.

1. *Municipal corporations. Streets. Duties of automobile drivers.*
   It is negligence for the driver of an automobile not to look in both directions when passing a street crossing. *Ulmer v. Pistole*, 485.

2. *Municipal corporations. Streets. Speed of travel.*
   The driving of an automobile at an unlawful and dangerous rate of speed, upon a frequently used street in a populous part of a city, is negligence *per se*. *Ib.*

3. *Municipal corporations. Streets. Speed of travel.*
   The operator of an automobile is entitled to the reasonable use and enjoyment of the streets and highways so long as he operates his car in a careful and lawful manner, but the negligent and reckless operator who drives his car at a dangerous or unlawful rate of speed in disregard of the rights and safety of others should be held to strict accountability both civilly and criminally for his wrongful conduct. *Ib.*

4. *Municipal corporations. Street. Speed of travel.*
   The same general law applicable to the use of all vehicles on public highways applies to automobiles, the substance of which is that a driver must use that degree of care and caution which an ordinarily prudent person would exercise under the same circumstances. *Ib.*

5. *Same.*
   The driver of an automobile must keep his machine constantly under control; he must continue on the alert for pedestrians and others using the streets, and must anticipate their presence; especially must he expect and look out for vehicles and persons at such places as street intersections and corners, shopping centers, and other familiar places by and through which the main currents of the population habitually pass. It is his duty to slow down at street intersections in order that possible accidents and collisions may be foreseen and averted. *Ib.*

BANKRUPTCY.

Bankrupt's right to dispose of exempt property.
After a bankrupt has successfully claimed property as exempt he has the right to dispose of it as he sees proper. *Hunter v. Forrest*, 7.

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BILL OF EXCEPTIONS.

1. *Appeal and error. Stenographer's notes. Order extending time. Validity. Statute.*

Under chapter 111, Laws 1910, section 797, par. D, the trial judge has the power to extend the time within which a stenographer may file a transcript of the evidence sixty days in addition to the original sixty days allowed him therefor by the statute, and an order granting an extension of more than sixty additional days was valid to the extent of the additional sixty days which the judge had the power to grant. *Met. Casualty Ins. Co. of N. Y. v. Sullivan*, 399.

2. *Same.*

The statute also provides that in case the stenographer failed to file a transcript the appellant should have forty days after the expiration of the sixty days allowed the stenographer by law or after the expiration of any extension of time lawfully granted, in which to prepare and present to the judge a bill of exceptions in the case as if there had been no stenographer therefor, and in such case as an order granting the stenographer more that sixty days additional was valid to the extent of sixty days additional time, a bill of exceptions filed within forty days after such sixty days additional time complied with the statute, and would prevent the bill of exceptions from being stricken from the record. *Ib.*

BILL OF LADING.

1. *Carriers. Transfer of bill of lading. Title.*

An assignment or transfer of the invoice or bill of sale of a carload of lumber by the consignor to a bank, together with the delivery of the bill of lading, vested in the bank whatever title the consignor had to such lumber, this assignment and delivery constituted a symbolical delivery of the carload of lumber. *Merchants & Mfgrs. Bank of Ellisville v. Toomer Lbr. Co.*, 647.

2. *Sale. Retention of bill of lading and delivery to bank. Effect.*

The retention of a bill of lading covering a carload of lumber by the consignor and the delivery of it, together with an assignment of the invoice of the lumber to a bank, in the absence of any testimony as to an absolute sale of the property to the consignee, shows that the consignor did not intend to part with its title or right of *jus disponendi* over the carload of lumber by the consignment to the consignee of the lumber. *Ib.*

See EVIDENCE.

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BILLS AND NOTES

1. *Evidence. Collateral agreement.*

Where in a suit by a bank on a discounted note, the testimony showed that the note was charged back to the payee indorser, who accepted the note and thereafter was the real owner of it, testimony was admissible by the maker showing a collateral agreement with the payee which permitted cancellation of the note at its maturity, if the maker did not then care to pay for stock purchased therewith. *Adair v. Bank of Hickory Flat*, 29.

2. *Action by holder. Question for jury. Sufficiency of evidence.*

Where in a suit by a bank on a discounted note which had been charged back to the payee endorser, there was evidence of a collateral agreement between the payee and maker, which allowed the cancellation of the note at its maturity, if the maker did not desire to carry out a purchase of bonds for which the note was given, a peremptory instruction for plaintiff was erroneous. *Ib.*

3. *Transfer. Consideration. Preexisting debt of indorser.*

In such a suit it was competent to plead and to show by proof also that a material portion of the proceeds of the note were applied by the bank to ward liquidating a preexisting indebtedness. *Ib.*

4. *Bona-fide holder. Retransfer to payee.*

The payee of a note who has discounted it with a bank, cannot after repossessing it, thereafter rely on the *bona-fides* of the bank. *Ib.*

5. *Bank and banking. Action against president. Evidence. Agreement dismissing appeal.*

Where the president of a bank had taken up his own loan with the money of the bank with knowledge of the infirmities of the title and the bank had been unable to realize in full on the loan because of the title set up by others, an agreement to dismiss the appeal from the decree adjudging that the bank had knowledge of the infirmities in the title was admissible in a suit in which the bank sought to hold the president liable for making such loan. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

6. *Want of consideration. Void.*

Where a husband dying left no estate, a promissory note by his widow in settlement of his debt was without consideration and void. *Sykes v. Moore*, 508.

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BILLS AND NOTES—Continued.

7. *Validity. Fraud. Mistake.*

Where the widow of a deceased member of a lodge upon whose life she held a policy was induced by the collector and treasurer of the lodge to give him a note and assignment of an interest in the policy to pay the debt of the deceased husband to him, by representing to her that she could not collect the policy unless she executed such note and assignment, and the husband had left no estate, in such case the note and assignment was without consideration, and could not be enforced. *Ib.*

8. *Same.*

A debt of a deceased husband is not a sufficient consideration for a note executed by his widow unless she receives assets from the estate. *Ib.*

9. *Conflict in evidence. Question for jury.*

Where, in a suit on a note by the assignee thereof, the defendant maker pleaded as a set-off certain notes assigned to him by plaintiff's assignors and there was a material conflict in the evidence as to whether the notes pleaded by defendant as set-offs were assigned to him with the understanding that plaintiff's assignors would be responsible for their payment and as to whether there was a demand for payment on the makers and as to whether plaintiff promised to pay them after knowledge of the makers' default in payment. In such case a peremptory instruction should not have been given but the case should have been submitted to the jury. *Council v. Murphy*, 593.

BOARD OF SUPERVISORS.

1. *Taxation. Equalization by board. Jurisdiction.*

When the board of supervisors is meeting for the equalization of taxes, it acts as a court of limited jurisdiction and all of the jurisdictional facts must appear upon the minutes of the board to render its proceedings valid. *Robertson v. First Nat. Bank of Greenwood*, 840.

2. *Taxation. Equalization. Notice to taxpayers.*

Under section 6, chapter 98, Laws 1916, it is incumbent on the president of the board of supervisors to give five days' notice "by posting at the court house or publishing in a newspaper of the county, of the special meeting at which action is to be taken for the equalization of taxes and where such notice was

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BOARD OF SUPERVISORS—Continued.

not given the board of supervisors was without jurisdiction to raise the assessment of defendant bank at that meeting or at a later meeting, also without notice, and their orders and proceedings were absolutely void. *Robertson v. First Nat. Bank of Greenwood*, 840.

See HIGHWAYS; TAXATION.

BONDS.

Bond to release money. Judgment.

Where in a suit by a bank against its president the bank prayed in its bill that the money of its president in the bank should be applied to the indebtedness due it by him and the president had given a bond for the release of this money, a decree was erroneous which failed to give judgment on such bond. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

BROKERS.

Realty brokers. Right to commission.

Where a landowner contracted in writing with a broker to sell certain of his lands at a named price and agreed to pay the broker a commission of five per cent. on the amount "for which the above property may be sold during the time such property may remain with him" and the broker, during such time, procured a purchaser at a greater price, who bought the land; in such case the owner was liable to the broker for five per cent. upon the price the lands were actually sold for. *Kelley v. Peacock*, 555.

BURDEN OF PROOF.

Action attacking railroad commission's order.

Under Code 1906, section 4836, so providing, the order of the railroad commission establishing a depot was *prima-facie* correct and proper and one who attacks such order has the burden of proving its unreasonableness by "clear and satisfactory evidence." *Miss. R. R. Comm. v. Mobile & O. R. Co.*, 101.

See EVIDENCE; TROVER AND CONVERSION; USURY.

BURGLARY.

Evidence. Sufficiency.

Where on a trial for burglary the evidence showed that a warehouse was robbed of certain groceries; that defendant had in his possession, groceries of the same description in large quantities a day or two after the storehouse was robbed; but there

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BURGLARY—Continued.

was no evidence that a lock had been broken or windows raised, and the only testimony introduced by the state to show that the store had been robbed was that the porter of the warehouse testified that when he unlocked the warehouse at the usual time in the morning he noticed certain boxes had been broken open and a large part of the contents removed. This evidence was insufficient to establish a breaking and entering of the warehouse from which the articles were alleged to have been stolen. *Gilford v. State*, 300.

CANCELLATION OF INSTRUMENTS.

1. *Pleading. Bona-fide incumbrances. Demurrer.*

Where a bill by the widow and children of a deceased grantor to cancel his deed, and trust deeds given by the grantee, alleged that after the death of the grantor the grantee executed certain trust deeds to defendants to secure loans for stated amounts, and that during such time plaintiff continued in possession, thus negativing knowledge or notice or plaintiff's claim on the part of defendant mortgagees, except such as would be implied from plaintiff's possession. In such case defendants could take advantage of their claims, as *bona-fide* incumbrancers for value, by demurrer. *Jones v. Grimes*, 874.

2. *Injunction. Sale of timber. Forfeitures. Accounting.*

Where under a contract for the sale of standing timber, defendant was to make certain improvements as a part consideration within two years or forfeit a deposit, and there was a further subsequent contract that the improvements should be made before a certain date, but not referring to the forfeiture named in the first contract, it was erroneous for the court to grant an injunction against further cutting and decree cancellation of defendant's claim before the two years for performance had expired, or, if cancellation was to be had in not awarding to defendant the consideration paid, as a consideration of cancellation, or in not ordering an accounting to see whether any sum was due defendant under the contract. *McClurg v. Hicks*, 879.

CARRIERS.

1. *Loss of live stock. Evidence. Sufficiency.*

Where in an action by a shipper against a common carrier for damages to live stock resulting from alleged negligence in handling them, the evidence showed that the animals were not

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CARRIERS.

CARRIERS—Continued.

physically injured, but were in apparently good condition when delivered to the consignee; that in the stockyards from which the stock were shipped there had been a short time before they were placed there, a contagious disease similar to the disease contracted by the animals in question; that live stock shipped from the North to South in that season frequently suffered from shipping cold and that several days after plaintiff received them, several animals developed colds, followed by pneumonia and died, but there was no evidence that this condition resulted from the negligence of defendant, in such case a verdict for plain tiff was erroneous and the court should have given a peremptory instruction for defendant. *Illinois Cent. Ry. Co. v. Ainsworth*, 20.

2. *Carriage of passengers. Conduct of conductor. Sufficiency of evidence.*

In a suit by a passenger against a railroad company and its conductor for actual and punitive damages, because of the conductor's conduct in insisting that plaintiff had not purchased a ticket to her destination, the court held that the facts set out in its opinion did not show that the conductor failed to treat plaintiff with proper courtesy, and plaintiff failed to make out a case for punitive damages. *Mobile & Ohio R. Co. v. Farrior*, 96.

3. *Master and servant. Injuries to servant. Negligence. Evidence.*

Section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence, is applicable as a rule of evidence in the courts of this state, regardless of whether the cause of action arises under the Federal Employer's Liability Act (Act April 22, 1908C 149, 35 Stat. 65 U. S. Comp. St. 1916, sections 8657-8665) or under the state law. *Y. & M. V. R. R. Co. v. Mullins*, 343.

4. *Stoppage in transitu.*

In such case the doctrine of stoppage *in transitu* does not apply where the legal title to the lumber sold was in the bank. *Merchants & Mfgrs. Bank of Ellisville v. Toomer Lbr. Co.*, 647.

5. *Frauds, statute of. Delivery to carrier.*

The delivery of goods to a common carrier consigned to the purchaser is a delivery to the purchaser of such goods. *Walker Bros. & Co. v. Daggett*, 657.

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CARRIERS.

CARRIERS—Continued.

See CONTRACTS.

6. *Delivery of property to stranger. Liability.*

If a shipper of property is not the real owner, the carrier may, upon demand, turn the property over to the true owner and defeat the shipper's claim or suit for failure to deliver by an affirmative showing that it had turned the goods over to the true owner. *Abasi Bros. v. L. & N. R. Co.*, 803.

7. *Delivery of property to stranger. Liability.*

Presumptively the bailor or shipper is entitled to the property as against the carrier, and the bailee cannot himself hold the property by setting up title in a third person, but this rule has no application when the carrier yields to the paramount claim or title of the true owner. *Ib.*

8. *Action for failure to deliver. Burden of proof.*

To justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery. *Ib.*

9. *Passenger trains. Passenger depot. Code* 1906, *sec.* 4867.

Where the train upon which plaintiff took passage carried passengers and took on passengers at a point and time in question, it was a passenger train within the meaning of Section 4867, Code 1906, providing that every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival and one-half hour after the departure of passenger trains; and all reception rooms shall be made comfortable and properly heated. *Adams v. Y. & M. V. R. Co.*, 865.

10. *Station. Duty of carrier.*

Where a station was a regularly established station and the railroad company had a waiting room for passengers and sold tickets, checked baggage, etc., at that point and trains stopped there for passengers on flag and frequently without flagging, plaintiff, an intending passenger, had a right to rely thereon. *Ib.*

11. *Care of station. Passenger station.*

Since under Code 1906, section 4867, so providing carriers are required to keep "all passenger stations" open and comfortably heated for intending passengers, a regularly established station did not cease to be such within the meaning of the statute because some of its trains only stopped on flag, and the company having invited the public to take passage at that point, it was its duty to keep its waiting rooms open and comfortably heated for passengers about to take its trains. *Ib.*

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CLERKS OF COURTS—CODES 1906.

CLERKS OF COURTS.

Compensation. Copy of tax assessments.

Under Code 1906, section 2175, declaring that the board of supervisors may allow the clerk reasonable compensation for making copies of assessment rolls, not to exceed one cent for each separate assessment of lands per copy but the board may allow as much as fifty dollars in any case for copying the personal roll and under section 4384, requiring the state Railroads Commissioner to assess property of railroads, telegraph, telephones sleeping car and express companies and section 4387, providing that in each year the commission shall make out for each county having any such property an assessment roll of such property therein and assess both real and personal property, and that the form of such assessment shall be transmitted to the clerk and under section 4390 requiring the clerk to make copies but making no provisions for compensation, the clerk's compensation is governed by section 2175, and in a suit by the board of superivisors against its clerk for over payments made him for such service, the board cannot recover unless it specifies in its declaration what companies were assessed in the county by the railroad commission and the number of such assessments and the amount that was properly allowed the clerk. *Board of Supvrs. of Grenada County v. King*, 521.

CODES 1906.

§ 10. Libel and slander. Actionable words. Insulting language *Nabors v. Mathis*, 564.

§§ 331, 334. Counties. Limitation of taxation. Construction of statutes. *Y. & M. V. R. Co. v. Grenada County*, 238.

§ 4017. Quo warranto. Grounds. Exercise of corporate franchise and powers. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

§ 624. Injunction. Action for wrongful injunction. Dismissal of suit. *Alexander v. Woods*, 164.

§ 706. Cost. Taxation. Amount recovered. *Gulfport Turpentine Co. v. Strickland*, 1.

§ 920. Corporations. Service on foreign corporation. Immediate mailing of registered copy. Statute. *Columbia Star Milling Co. v. Brand*, 625.

§ 930. Corporations. Failure to report organization. Liability as partners. Statute. *Hessig-Ellis Drug Co. v. Wilkerson*, 668.

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CODES 1906.

CODES 1906—Continued.

§ 1016. Equity. Decree. Amendment. Evidence. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

§ 1055. Animals. Registration. Offenses. Statute. *State v. Edwards*, 704.

§ 1168. False pretenses. Property subject to lien. Statute. *State v. Fetterman*, 828.

§ 1192. Forgery. Uttering forged instruments. Instructions. Statutes. *May v. State*, 708.

§§ 1229, 1512. Jury. Exclusion from jury of conscientious objectors to capital punishment. Statutes. *Borowitz v. State*, 47.

§ 1436. Larceny. Indictment. Sufficiency. Dollar. Statute. *State v. Walker*, 700.

§ 1750. Intoxicating liquors. Transporting liquors. Forfeiture of vehicles. Statute. *Aldinger v. State*, 314.

§ 1975. Partnership. Denial. Verification of pleadings. *Walker Bros. v. Nix*, 199.

§ 1985. Master and servant. Injuries to servants. Negligence. Evidence. *Y. & M. V. R. R. Co. v. Mullins*, 343.

§§ 2075, 2079. Executors and administrators. Sale of land. Existence of personalty. Sale of realty. Parties interested. Annuitants. Contingent remaindermen. *Brickell v. Lightcap*, 417.

§ 2157. Homestead. Abandonment. Statutes. *Jackson v. Coleman*, 535.

§ 2175. Clerks of courts. Compensation. Copy of tax assessments. *Board of Sup'rs. of Grenada County v. King*, 521.

§ 2197. Sheriffs. Tax sale. Fee. Statute. *Darnell v. Smith*, 547.

§ 2353. Garnishment. Answers. Contest. Statute. *Mechanics & Traders Ins. Co. v. Butler*, 476.

§ 2615. Insurance. Forfeiture. Waiver and estoppel. Knowledge of agent. *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 561.

§ 2678. Usury. Excessive interest. Statute. Construction. *Doyle v. L. Herzog & Bros. Dry Goods Co.*, 154.

§ 2683. Appeal and error. Review. Reversal. *Hattiesburg Hardware Co. v. Pittsburg Steel Co.*, 663.

§ 2796. Mortgages. Mistake of recorder. Effect. "Appears on face of record." "Appears by the record." Defective record. Secondary liens. Creditors. Subsequent purchaser. *Bank of Lexington v. Cooper*, 782.

§ 3075. Mechanics. Right to lien. Character of work. Personal property. Statute. *Orr v. Jackson Jitney Co.*, 140.

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COLLEGES AND UNIVERSITIES.

CODES 1906—Continued.

§ 4328. Taxation. Tax sales. Contiguous tracts. *Wilkerson v. Harrington*, 637.

§ 4442. Highways. Road tax. Liability for commutation. *Thomason v. Board of Sup'rs. of Lawrence County*, 293.

§§ 4443-4469. Highways. Taxation. Distribution by counties. Road tax. Liability to town. Amount. *Town of Crenshaw v. Panola County*, 891.

§§ 4465, 4469. Highways. Taxes. Validity. *Y. & M. V. R. Co. v. Grenada County*, 238.

§ 4738. Licenses. Trial. State revenue agent. Power to sue. *Robertson, Revenue Agent, v. F. Goodman Dry Goods Co.*, 210.

§ 4740. Taxation. Assessments. State revenue agent. Commissions. *Johnson v. Board of Sup'rs. of Yazoo County*, 528.

§ 4779. Frauds, statute of. Oral contract. Validity. *Walker Bros. & Co. v. Daggett*, 657.

§ 4784. Executors and administrators. Right to possession of property against claim of third party. Protection of creditors. Statute. *Hunter v. Forrest*, 7.

§ 4784. Sales. Conditional sale. Priority. Judgments. General liens. *Orr v. Jackson Jitney Co.*, 140.

§ 4867. Carriers. Passenger trains. Passenger depot. Care of station. Passenger station. *Adams v. Y. & M. V. R. Co.*, 865.

§ 5078. Wills. Execution. Signature. Statutes. Holographic wills. Suscribed. *Better v. Hirsch*, 614.

COLLEGES AND UNIVERSITIES.

1. *Professors. Contracts.*

Under the facts set out in its opinion the court held that the letter and telegram mentioned therein and upon which suit was based did not constitute a written contract between the appellant and the appellee as to the number of years appellee was to serve or as to what his salary was to be or would be as a full professor. *University of Miss. v. Deister*, 469.

2. *Professors. Contract. Dismissal.*

After the passage of the order by the board of trustees as set out in the opinion of the court, plaintiff's employment was subject to such order of the board, which became a part of his contract and thereunder the board of trustees had a right at their pleasure to dismiss him from his professorship. *Ib.*

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COMMERCE—CONSIDERATION.

COMMERCE

1. *Interstate commerce. Constitutional provision.*

Laws 1916, chapter 135, section 3, prohibiting the letting by boards of supervisors of counties of contracts to furnish the county with blank books, stationery, etc., to any bidder who is a nonresident of the state, who has not a printing plant in the state or who is not a *bona-fide* resident of the state actually engaged in the printing business is not violative of article 1, section 8 of the Constitution of the United States giving Congress the right to regulate commerce among the several states, since such provision of the Constitution is not intended to affect contracts which have an indirect or remote bearing on commerce between the state. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 254.

2. *Same.*

It is only direct interference with the freedom of interstate commerce that brings the case within the exclusive domain of federal legislation, the state in the exercise of its police power may make regulations which indirectly affect interstate commerce. *Ib.*

COMPROMISE AND SETTLEMENT

Question for jury. Construction.

Where plaintiff sold goods on defendant's order and defendant refused to pay for same, and plaintiff sued but the attorneys for both parties reached an understanding resulting in a judgment of dismissal, and the parties afterwards disagreed as to the meaning of the settlement agreement and plaintiff brought a new action for the original amount, in such case it was a question for the jury as to what was the agreement and it was error to peremptorily instruct for the defendant, especially where defendant did not attempt to carry out the agreement for which it contended. *Michael Co. v. O'Connell-Myers Co.*, 720.

CONDITIONAL SALES.

See SALES.

CONSIDERATION.

1. *Bills and notes. Transfer. Preexisting debt of indorser.*

In such a suit it was competent to plead and to show by proof also that a material portion of the proceeds of the note were applied by the bank toward liquidating a preexisting indebtedness. *Adair v. Bank of Hickory Flat*, 29.

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CONSTITUTIONAL LAW.

CONSIDERATION—Continued.

2. *Reformation of instruments. Voluntary conveyances.*

The general rule that voluntary conveyances being without consideration gives the grantee no right to reform without the consent of all parties, applies only in cases between the donor and donee. *Spencer v. Spencer*, 71.

3. *Same.*

This rule does not apply to conveyances in execution of a family settlement. *Ib.*

4. *Bills and notes. Want of consideration. Void.*

Where a husband dying left no estate, a promissory note by his widow in settlement of his debt was without consideration and void. *Sykes v. Moore*, 508.

5. *Bills and notes. Validity. Fraud. Mistake.*

Where the widow of a deceased member of a lodge upon whose life she held a policy was induced by the collector and treasurer of the lodge to give him a note and assignment of an interest in the policy to pay the debt of the deceased husband to him, by representing to her that she could not collect the policy unless she executed such note and assignment, and the husband had left no estate, in such case the note and assignment was without consideration, and could not be enforced. *Ib.*

6. *Same.*

A debt of a deceased husband is not a sufficient consideration for a note executed by his widow unless she receives assets from the estate. *Ib.*

CONSTITUTION.

§§ 147, 162. Licenses. Trial. State revenue agent. Power to sue. Appeal and error. Appealable orders. *Robertson v. Goodman Dry Goods Co.*, 210.

§§ 107, 2, art. 4. Constitutional law. Privileges and immunities. Counties. Contracts. Constitutional and statutory provisions. *State ex rel. Collins v. Sanatobia Blank Book & Stationery Co.*, 254.

§ 147 (1890). Appeal and error. Reversal. Form of action. *Cooley v. Tullas*, 268.

§ 144. (1890). Courts. Previous decisions as precedents. Power to overrule. *Brewer v. Browning*, 358.

§ 104. Limitation of actions. Municipal corporations. Constitutional provisions. *Town of Crenshaw v. Panola County*, 891.

CONSTITUTIONAL LAW.

1. *Schools and school districts. Race legislation.*

Act 1910, chapter 124, as amended by Act 1912, chapter 255, in reference to consolidated schools, is not in conflict with the

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CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

state or federal constitution, because under the law the board has the same power to create consolidated schools for the colored race that it has for the white race. *Trustees of Walton School v. Board of Supervisors of Covington County*, 117.

2. *Class legislation. Pleading. Sufficiency.*

A bill for an injunction against the issuance of bonds for a consolidated school district is insufficient to present the question whether the order creating the consolidated school was invalid because it did not provide for the maintenance of a colored school, where it did not allege, first, that there was sufficient colored children to maintain a public school and, second, where it did not allege that there was no colored school located in the territory comprising the district whereat the colored children may be educated in the same subjects taught in the consolidated school. *Ib.*

3. *Appeal and error. Appealable orders.*

Notwithstanding, section 147 of the Constitution, which provides that no judgment or decree in any chancery court shall be annulled or reversed for want of jurisdiction or from any error or mistake as to whether the cause was of equity or common-law jurisdiction, an order of the chancellor sustaining a demurrer to a bill and ordering its transfer to the circuit court is appealable. *Robertson, Revenue Agent, v. F. Goodman Dry Goods Co.*, 210.

4. *Commerce. Interstate commerce. Constitutional provisions.*

Laws 1916, chapter 135, section 3, prohibiting the letting by boards of supervisors of counties of contracts to furnish the county with blank books, stationery, etc., to any bidder who is a nonresident of the state, who has not a printing plant in the state or who is not a *bona-fide* resident of the state actually engaged in the printing business is not violative of article 1, section 8 of the Constitution of the United States giving Congress the right to regulate commerce among the several states, since such provision of the Constitution is not intended to affect contracts which have an indirect or remote bearing on commerce between the states. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 254.

5. *Same.*

It is only direct interference with the freedom of interstate commerce that brings the case within the exclusive domain of federal legislation, the state in the exercise of its police power may make regulations which indirectly affect interstate commerce. *Ib.*

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CONSTITUTIONAL LAW—Continued.

6. *Privileges and immunities.*

Chapter 135, section 3, Laws 1916, is not violative of Constitution of the United States, article 4, section 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, since counties are mere political subdivisions of the state for the purpose of exercising a part of its powers and may exert only such powers as are expressly granted to them or necessarily implied from those granted, hence regulation of their contracts is a regulation of the contracts of the state and no one is entitled to absolute right to contract with the state. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 254.

7. *Privileges and immunities. Due proof of law. Equal protection of laws.*

Chapter 135, section 3, Laws 1916, is not violative of the Constitution of the United States, amendment 14(A), providing that no state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law. *Ib.*

8. *Counties. Contracts. Constitutional and statutory provisions.*

Section 3, chapter 135, Laws 1916, is not violative of section 107 of the Constitution, providing that stationery, printing, etc., used by the legislature and other departments of the Government shall be performed under contracts subject to the approval of the governor and state treasurer, since a county is not a department of the state but a political subdivision. *Ib.*

9. *Wisdom of statute. Legislative question.*

With the wisdom of a legislative act the courts have nothing to do, that is a matter entirely for the lawmaking body. It is solely the duty of the court to say whether or not the act as passed by the legislature is violative of any of the provisions of the state or federal Constitutions. *Ib.*

10. *Appeal and error. Reversal. Form of action.*

Under Constitution 1890, section 147, so providing, where the circuit court assumes jurisdiction of a cause of action to enforce the lien of employees of a sawmill against their employer's lumber under Laws 1908, chapter 131, and proceeds to judgment, it will not be disturbed on the ground that the action should have been brought in the chancery court. *Cooley v. Tullas*, 268.

See CARRIERS; CONTRACTS; COURTS; MUNICIPAL CORPORATIONS.

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CONTRACTS.

CONTRACTS—Continued.

1. *Constitutional law. Privileges and immunities.*

Chapter 135, section 3, Laws 1916, is not violative of Constitution of the United States, article 4, section 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, since counties are mere political subdivisions of the state for the purpose of exercising a part of its powers and may exert only such powers as are expressly granted to them or necessarily implied from those granted, hence regulation of their contracts is a regulation of the contracts of the state and no one is entitled to absolute right to contract with the state. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

2. *Guaranty. Offer and acceptance.*

Where a traveling salesman who received a commission on sales and was therefore pecuniarily interested in the acceptance of orders taken by him, not only recommended, to his house the acceptance of an order, but stated that as to all orders sent in, "I know they are all O. K. and any I sell I am willing to guarantee payments of their bill," and his employers extended the credit; in such case there was an acceptance of the offer to guarantee and the letter and the acceptance created the relationship of guarantor and guarantee. *Richmond Paper Co. v. Bradley*, 307.

3. *Carriers. Notice of loss. Question for jury.*

Where under a bill of lading, making it a condition precedent to a recovery of damages for loss in shipment of stock, that the shipper give notice in writing of his claim to a general officer or the nearest local station agent, the shipper orally notified the station agent, who wrote out the claim, but the shipper himself was not quite positive that the written claim was made, though he testified, as his best recollection that it was reduced to writing, in such case it was a question for the jury as to whether the stipulation was complied with. *Pickle v. Receiver of St. Louis & S. F. Ry. Co.*, 322.

4. *Insurance. Fire insurance. Additional insurance clause. Waiver.*

A provision in a fire insurance policy that it should be void if insured should procure any other insurance on the property in excess of one thousand dollars, is not waived by the insurer's agent offering insured an additional policy of another company for a greater amount than permitted by the first policy, where neither the insurer nor the agent knew that additional insurance had been taken out by insured after the fire, and insured was fully aware that he was bound by his contract. *Palatine Ins. Co. v. Smith McKinnon & Son*, 324.

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CONTRACTS.

CONTRACTS—Continued.

5. *Wills. Construction. Distinguished from trust.*

In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance but the time at which by the terms of the instrument a property right under the instrument attaches. If by the terms of the instrument no property right is to attach under it until testator's death, the instrument is a will; but if a property right attaches during testator's lifetime, the instrument is a contract, even though the time of performance may be postponed till the death of the testator. *Morgan v. Hayward*, 354.

6. *Limitation of actions. Statute applicable. Implied contracts.*

The limitation of three years provided by section 3099, Code 1906, governs in an action by a railway company to recover freight charges, where the writings introduced in evidence do not set forth the terms of any contract entered into between the parties thereto, but simply show that the railway company collected from the shipper a less sum of money for transporting lumber than under the law, it should have done by reason of which the law imposes an obligation upon the shipper to account to the railway for the difference between the money which it actually paid and that which it should have paid, thereby giving rise to a contract the terms of which were not express, but only implied by law. *Pate Lumber Co. v. So. Ry. Co. in Miss.*, 402.

7. *Colleges and universities. Professors.*

Under the facts set out in its opinion the court held that the letter and telegram mentioned therein and upon which suit was based did not constitute a written contract between the appellant and the appellee as to the number of years appellee was to serve or as to what his salary was to be or would be as a full professor. *University of Miss. v. Deister*, 469.

8. *Colleges and universities. Professors. Dismissal.*

After the passage of the order by the board of trustees as set out in the opinion of the court, plaintiff's employment was subject to such order of the board, which became a part of his contract and thereunder the board of trustees had a right at their pleasure to dismiss him from his professorship. *Ib.*

9. *Brokers. Realty brokers. Right to commission.*

Where a landowner contracted in writing with a broker to sell certain of his lands at a named price and agreed to pay the broker a commission of five per cent. on the amount "for which

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CONTRACTS—Continued.

the above property may be sold during the time such property may remain with him" and the broker, during such time, procured a purchaser at a greater price, who bought the land; in such case the owner was liable to the broker for five per cent. upon the price the lands were actually sold for. *Kelly v. Peacock*, 555.

10. *Frauds, statute of. Oral contract. Validity.*

Under Code 1906, section 4779, so providing, a verbal contract for the sale of goods is binding on the purchaser where he accepts and pays for a part of the same and he cannot cancel the order as to the balance of the goods though the contract is not in writing. *Walker Bros. & Co. v. Daggett*, 657.

11. *Sale. Breach. Remedies.*

Where a part of a bill of goods verbally ordered was accepted and paid for by the purchaser, but before the balance of the goods were shipped, the purchaser notified the seller that he would not accept or pay for the balance of the goods, in such case the seller had the right to ship the goods and recover for the same and was not bound to sell the goods and sue for the difference between the price realized at such sale and the contract price. *Ib.*

12. *Limitation of actions. New contract. Correspondence.*

Where the purchaser of law books from a publishing company neglected to execute the installment notes therefor and some time thereafter wrote the publishing company, suggested that it make the purchase notes payable in installments of five dollars and ten dollars which was an alteration of the original agreement, and the publishing company accepted this proposition, this correspondence between the parties constituted a new written contract made and accepted by both parties, and the six year statute of limitations must be applied to such last contract. *Edward Thompson Co. v. Foy*, 848.

13. *Offer. Signing on typewriter.*

A letter constituting a contractual offer signed on a typewriter, is valid and binding on the signer, if he wrote it and signed it on the typewriter, or authorized that to be done. *Ib.*

See CANCELLATION OF INSTRUMENTS; CONSTITUTIONAL LAW; COUNTIES; LANDLORD AND TENANT.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

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CORPORATIONS.

1. *Stockholder's action against directors. Sufficiency of bill. Right to sue.*

A bill by the stockholders of a bank against the directors for the book value of the stock is not demurrable where it alleges that the directors, by their misconduct, rendered the stock valueless, that the receiver had declined to bring the suit and showed that he was not a necessary party for which reason he was not joined in the suit, as a party defendant. *Kelly v. Applewhite*, 5.

2. *Quo warranto. Grounds. Exercise of corporate franchise and powers.*

Under section 4017, Code 1906, *quo warranto* was the correct procedure for the attorney-general of the state to pursue, where a corporation practiced fraud in obtaining its charter and the acts of the alleged corporation under its charter have all been in violation of law. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

3. *Service on foreign corporation. Immediate mailing of registered copy. Statute.*

Where in a suit against a foreign corporation, service of process on an agent of the corporation was made on September 6, 1915, but a copy of the process was not mailed to the corporation by registered letter at its home office until December 30, 1915, the summons calling for the appearance of the corporation in court at rules September 13th, there was no compliance with Code 1906, section 920, providing that it shall be the duty of the clerk immediately to mail a copy of the process to the home office of the corporation by registered letter. *Columbia Star Milling Co. v. Brand*, 625.

4. *Appearance. Suggestion to court of attorney for individual defendant.*

In a suit against a foreign corporation and also its president who was its principal stockholder and active manager and who, in his individual answer, set up all the defenses he thought could have been set up by the corporation, such president's attorney of record, by his suggestion or argument to the court that the corporation was not properly in court; did not thereby enter an appearance for the corporation, since he clearly had the right to suggest that any proposed motion in the case should be overruled, either as attorney of one defendant or as *amicus curiae*. *Ib.*

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CORPORATIONS—Continued.

5. *Failure to report organization. Liability as partners. Statute.*

Notwithstanding a corporation on account of its defective organization in failing to report to the secretary of state in thirty days after its organization is only a *de facto* corporation and notwithstanding its right to do business as such is questionable only by the state in a direct proceeding, this does not relieve its stockholders from liability to its creditors under Code 1906, section 930, providing that should such report be not made within thirty days from the time of the organization, the charter granted shall be null and void and all persons doing business thereunder shall be deemed and held to be partners and liable as such. *Hessig-Ellis Drug Co. v. Wilkerson*, 668.

6. *Failure to report organization. Liability of stockholders as partners. Statute. Doing business.*

Under Code 1906, section 930, providing that all persons doing business under the charter of a corporation whose organization is not reported to the secretary of state in thirty days after its organization, shall be deemed to be partners and held liable as such, the stockholders of such corporation including one who bought his stock after the company had lost its right to do business because of its failure to report the organization to the secretary of state are liable to creditors since all did the business of the corporation in contemplation of law as well as its officers and agents. *Ib.*

CORPUS DELICTI.

Arson. Evidence. Sufficiency.

The *corpus delicti* in a case of arson consist, not only in the proof of the burning of the house or other things burned, but of criminal agency in causing the burning. *Rayborn v. State*, 730.

See EVIDENCE.

COSTS.

Taxation. Amount recovered.

Under section 706, Code 1906, so providing, where plaintiff sues in the circuit court and does not recover judgment for more than two hundred dollars, cost should be taxed against him unless the judge shall be of the opinion and so enter on the record that the plaintiff had reasonable ground to expect to recover more than two hundred dollars or unless the court shall have jurisdiction of the cause, without respect to the amount in controversy. *Gulfport Turpentine Co. v. Strickland*, 1.

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COUNTIES.

1. *Limitation of taxation. Construction of statutes.*

The limitation provided by chapter 85, Laws 1916, on the amount of taxes that boards of supervisors may levy, does not include taxes levied in order to raise revenue with which to discharge debts incurred by such boards under section 331 and 334, Code 1906, since by the general language there used, the legislature did not intend to withdraw from such boards the power to provide for the payment of debts which they had lawfully incurred. *Yazoo & M. V. R. Co. v. Grenada County*, 238.

2. *Contracts. Constitutional and statutory provisions.*

Section 3, chapter 135, Laws 1916, is not violative of section 107, of the Constitution, providing that stationery, printing, etc., used by the legislature and other departments of the Government shall be performed under contracts subject to the approval of the governor and state treasurer, since a county is not a department of the state but a political subdivision. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

3. *Liability. Statute.*

Counties are political subdivisions of the state and as such are immune from liability to the same extent that the state is. There can be no liability against either the state or a county unless it be expressly or impliedly created by statute. *City of Grenada v. Grenada County*, 831.

4. *Municipal corporations. Paving county property. Liability. Statute.*

Under Laws 1912, chapter 260, section 4, relating to paving, a municipal corporation has no legal right to impose liability upon a county or the court house property of the county for paving the street in front of it as the act in question gives no such authority in law. *Ib.*

5. *Liability of county property for debt.*

The public property of a county used in the orderly administration of governmental functions in and for the public interest cannot be levied upon and sold under execution, nor can a lien for a debt against it be enforced by foreclosure and sale, as such procedure would be against public policy and would hinder and impair the administration of the governmental functions of the state and county. *Ib.*

6. *Judgment against. Enforcement.*

The mere authorization of suit against a county does not imply necessarily, a means of enforcement of a judgment therein obtained.

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COURTS.

COUNTIES—Continued.

When a judgment is rendered against a county, it is the duty of the board of supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power, it is their duty to levy a tax for that purpose but if they have no funds, and the power to levy the tax has not been delegated to them, such tax cannot be levied without express legislative authority. *Town of Crenshaw v. Panola County*, 891.

See MUNICIPAL CORPORATIONS.

COURTS.

1. *Licenses. Trial. State revenue agent. Power to sue.*

Section 4738, Code 1906, empowering the state revenue agent to proceed by suit in the proper court for a past due and unpaid tax, was not designed to authorize the revenue agent to bring such an action in a court of equity and where such action is brought in the chancery court and that court decides to decline jurisdiction in such case section 162 of the Constitution providing that all cases that may be brought in chancery whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court, is mandatory and the chancery court should transfer the cause to the circuit court. *Robertson, Revenue Agent, v. F. Goodman Dry Goods Co.*, 210.

2. *Jurisdiction. Estoppel.*

In a suit by road contractors against a county, where, under their contract, they were entitled to a certain compensation, the fact that the board of supervisors of the county erroneously estimated the amount due the contractors at too high a figure, did not estop the county from afterwards questioning the jurisdiction of the court to try the case on account of the amount really involved. *Board of Sup'rs. of Lamar County v. Warden & Barrett*, 311.

3. *Judgments. Jurisdiction. Amount involved.*

Where the maximum recovery to which plaintiff was entitled was one hundred and thirty-eight dollars the circuit court was without jurisdiction though the suit was brought for two hundred and ten dollars. *Ib.*

4. *Previous decisions as precedents. Power to overrule.*

Under Constitution 1890, section 144, vesting the judicial power of the state in the supreme court and such other courts as are provided for in the Constitution, and under section 146, providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals there is no limit of the ap-

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CRIMINAL LAW.

COURTS—Continued.

pellate jurisdiction that may be conferred upon the supreme court, and such court has the power to overrule or change its decision whenever they are in its opinion erroneous or wrongful; and such change of decision would not violate the rule of *res adjudicata*. *Brewer v. Browning*, 358.

5. *Erroneous decisions. Litigants.*

A litigant has no vested interest in a court's mistake where the mistake is discovered before the final ending of the litigation. *Ib.*

6. *Executors and administrators. Sale of land. Existence of personalty.*

Under Code 1906, section 2075, authorizing a sale of land in preference to perscnalty where the court is satisfied that it would be to the interest of the distributees or legatee, the chancery court has jurisdiction on petition of an executor to decree a sale of realty, part of the *corpus* of the estate, where all necessary parties are before it, whether the property is devised by will or descends by operation of law. *Brickell v. Lightcap*, 417.

7. *Executors and administrators. Power to borrow money. Decree of chancery court.*

Where under the will the executor and trustee had no authority to borrow money and pledge the stock of the estate as security therefor, they could not do so under an unauthorized decree of the chancery court. *Luckett v. Brickell*, 457.

See CONSTITUTIONAL LAW.

CRIMINAL LAW.

1. *Documentary evidence. Judicial records.*

Where on a trial in the circuit court for perjury the indictment alleged that the perjury, occurred in a trial of a civil case before a justice of the peace, it was reversible error for the state to fail to introduce as evidence the record of the judgment of the justice of the peace showing the trial had in the justice court, since the trial of a civil case before a justice of the peace cannot be proven by oral testimony but must be shown by the official record of the judgment rendered in the trial in that court, if obtainable. *Harrington v. State*, 205.

2. *Confessions. Corpus delicti. Arson.*

The *corpus delicti* must be proven by evidence *aliunde* the confessions of the accused. *Rayborn v. State*, 730.

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DAMAGES.

1. *Attachment. Wrongful issuance. Excessive damages.*

Where on a writ of inquiry to assess the damage sustained by a defendant because of the wrongful suing out of an attachment against a vacant lot, the only testimony relating to any actual damages was that of defendant himself that he had some inquiries to sell the lot, and also some conversation with a gentleman about building a house thereon, but that he was unable to do either, because of the suing out of the attachment and the levy on the lots. These damages were too remote and speculative upon which to base a recovery, but in such case a recovery of attorney fees was correct. *Turner v. Crane*, 134.

2. *Inadequate.*

A verdict for two hundred dollars for the loss of three fingers by a minor while working in a sawmill was inadequate to compensate him for the injury sustained. *Walker Bros. v. Nix*, 199.

3. *Death. Excessive damages.*

Where a railroad flagman was killed, leaving his mother, sixty years of age with a life expectancy of fourteen years, to whom the flagman had contributed fifty dollars per month, a verdict for twenty thousand dollars was excessive, and should be reduced to twelve thousand, five hundred dollars where the suit for recovery of damages was under the Federal Employer's Liability Act, since under this act a recovery of damages is limited to the pecuniary loss to the mother and the damages from the pain and suffering of the deceased from the time he was injured until his death. *Y. & M. V. R. R. Co. v. Mullins*, 343.

4. *Excessive damages.*

A verdict of ten thousand dollars to a husband for the injury, pain, suffering and death of his wife caused by an automobile collision was not excessive. *Ulmer v. Pistole*, 485.

5. *Killing valuable dog on track. Instructions.*

In a suit for damages for the negligent killing of a blooded pointer dog, where the evidence showed that there was no local market for such dogs, the court should have instructed the jury to fix the value of the dog at such sum as the evidence showed that a man who wanted to buy such a dog would be willing to pay for same; and to aid the jury in arriving at the value of the dog, the court should permit the jury to consider the testimony as to the values of such dogs in other places, wherein the owner might find a purchaser. *Greenwald v. Y. & M. V. R. Co.*, 593.

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DEATH.

DAMAGES—Continued.

6. *Medical attention. Evidence. Instruction.*

In a suit for damages for personal injury where the evidence showed that plaintiff received medical attention and that her husband bought some medicine for her, an instruction for the plaintiff allowing the jury to take into consideration the expense of medical attention as an element of damages, was not reversible error, although the doctor attending her testified that he had not entered any charge for his service because the husband, though willing, was unable to pay for same. *Thomas v. Weeks*, 602.

7. *Injunction. Wrongful injunction. Attorney fees.*

In an action for damages for the wrongful suing out of an injunction preventing defendant's delivery of lumber, which it had sold to others, the measure of damages, as to attorney fees, where the bill was demurred to is the reasonable amount of attorney fees for the hearing of the demurrer to the bill in the court below and in the supreme court, on appeal, but no allowance should be made for services in a suit which arose subsequent to the dissolution of the injunction. *Thornton-Cloney Lumber Co. v. O'Quin & Sons*, 857.

8. *Same.*

In such case the damages after allowing attorney fees, would be the difference in the value of the lumber at the time of the suing out of the injunction and its value at the period of dissolution, with interest on the difference from the date of the suing out of the injunction. *Ib.*

9. *Telegraph and telephones. Failure to deliver telegram. Exemplary.*

Where in a suit against a telegraph company the declaration alleged that the company wantonly and wilfully refused to deliver a telegram, exemplary damages were recoverable if the averments of the declaration were true, even though no actual damages were suffered. *Johnson v. W. U. Tel. Co.*, 884.

See EVIDENCE; INJUNCTION.

DEATH.

Excessive damages.

Where a railroad flagman was killed, leaving his mother, sixty years of age with a life expectancy of fourteen years, to whom the flagman had contributed fifty dollars per month, a verdict for twenty thousand dollars was excessive, and should be reduced to twelve thousand, five hundred dollars where the suit

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DEATH—Continued.

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DELIVERY.

See SALES.

DESCENT AND DISTRIBUTION.

Adoption. What law governs. Inheritance.

Where a child was adopted in the state of Kentucky, under whose laws it inherits land from its adoptive parent, and upon its decease in infancy without issue the land so inherited reverts to the next of kin of such adoptive parent, such inheritance rules do not violate the Constitution or public policy of Mississippi, and will be applied to lands situated in this state. *Brewer v. Browning*, 358.

DIVORCE.

1. *Marriage. Capacity to marry. Prior marriage.*

A man already married and not divorced cannot marry another and a purported marriage between them was void, even without divorce. *Clark v. Clark*, 726.

2. *Same.*

In such case the second wife could legally marry another without obtaining a divorce from such pretended husband. *Ib.*

DYING DECLARATION.

See EVIDENCE.

EQUITY.

1. *Judgments. Equitable relief. Correction of errors of other courts.*

A court of equity is without power to correct mere errors alleged to have been made by another court in rendering a judgment in a cause of which it had full jurisdiction. The correction of such errors is committed solely to the supreme court on direct appeal thereto from the judgment or decree complained of. *Hinton v. Shedd, Sheriff*, 208.

2. *Replevin. Equitable defenses. Subrogation.*

In an action of replevin by an administrator *Cum testamento annexo* for stock certificates pledged by a former executor and trustee to secure a note to defendant for money borrowed by

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EQUITY—Continued.

the executor, even though such money was applied to the payment of the debts of the estate and even though the estate was bound therefor by subrogation to the defendant, this equitable defense of subrogation could not be pleaded in a court of law, as it was not of such a character as would in a court of equity transfer the legal title of the property to the defendant. *Luckett v. Brickell*, 457.

See PARTIES.

ESTATES.

Wills. Construction. Interest devised.

Where a testatrix devised to her two daughters the balance of her estate, real and personal, and provided that in case of their death, the children of each should inherit their mother's shares respectively, and in the case of the death of one without children, then the whole of the estate to go to the other, and in case of the death of both without children, the estate to go to the brothers and sisters of testatrix, then living. The contingency provided against was the death of either one of the daughters during the lifetime of the testatrix, and in the event of the daughters' survival of the testatrix they took a fee simple, regardless of the provisions of Code 1906, section 2764-2765-2776-2778. *Nations v. C. & U. S. Mortgage Co.*, 741.

ESTOPPEL.

1 *Insurance. Forfeiture of fire policy. Knowledge of agent.*

An insurer is bound by its agent's knowledge, and is estopped from claiming a forfeiture of a policy where its agent who solicited a renewal of a fire insurance policy, inspected the risk, receipted for the premium, and delivered the policy, had knowledge that the insured did not keep an iron safe as stipulated for in the policy, similar conditions having existed in the case of the previous policy and in such case it was immaterial whether the agent was a soliciting agent or a general agent of his company, since he was the only agent with whom the insured dealt. *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 333.

2. *Guaranty. Discharge of guarantor. Proving claim against bankrupt debtor.*

The probation of a creditor's claim in bankruptcy against the estate of his debtor and the acceptance of a dividend will not preclude the creditor from relying on the guaranty. *Richmond Paper Co. v. Bradley*, 534.

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EVIDENCE.

ESTOPPEL.—Continued.

3. *Insurance. Forfeiture. Waiver and estoppel. Knowledge of agent.*
Under Code 1906, section 2615, defining who are the agents of insurance companies and their powers, where the soliciting agent of a fire insurance company at the time the risk was accepted knew that the owner did not have and did not intend to have an iron safe and told him it was unnecessary to have such safe, such statement became and was the act of the insurance company, and it was bound in such case both upon waiver and estoppel. *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 561.

See JURISDICTION.

EVIDENCE.

1. *Bills and notes. Collateral agreement.*
Where in a suit by a bank on a discounted note, the testimony showed that the note was charged back to the payee indorser, who accepted the note and thereafter was the real owner of it, testimony was admissible by the maker showing a collateral agreement with the payee which permitted cancellation of the note at its maturity, if the maker did not then care to pay for stock purchased therewith. *Adair v. Bank of Hickory Flat*, 29.

2. *Bills and notes. Action by holder. Question for jury. Sufficiency of evidence.*
Where in a suit by a bank on a discounted note which had been charged back to the payee endorser, there was evidence of a collateral agreement between the payee and maker, which allowed the cancellation of the note at its maturity, if the maker did not desire to carry out a purchase of bonds for which the note was given, a peremptory instruction for plaintiff was erroneous. *Ib.*

3. *Carriers. Carriage of passengers. Conduct of conductor. Sufficiency of evidence.*
In a suit by a passenger against a railroad company and its conductor for actual and punitive damages, because of the conductor's conduct in insisting that plaintiff had not purchased a ticket to her destination, the court held that the facts set out in its opinion did not show that the conductor failed to treat plaintiff with proper courtesy, and plaintiff failed to make out a case for punitive damages. *Mobile & Ohio R. Co. v. Farrior*, 96.

4. *Review of chancellor's decree disapproving railroad commision's orders.*
In this case the court held that there was evidence sufficient to sustain the decree of the chancellor in disapproving the order of

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EVIDENCE.

EVIDENCE—Continued.

the railroad commission requiring the erection of a new passenger depot. *Miss R. R. Comm. v. Mobile & O. R. Co.*, 101.

5. *Attachment. Wrongful Issuance. Evidence. Sufficiency.*

Under the facts set out in its opinion in this case the court held that the court below correctly sustained a peremptory instruction for the defendant that the attachment was wrongfully sued out. *Turner v. Crane*, 134.

6. *Larceny. Sufficiency of evidence.*

A conviction of grand larceny will be reversed on appeal where the indictment charged the larceny of three yearlings and a cow, described merely by the owner's name, and where the testimony showed that the cow did not belong to the party as charged in the indictment and the jury might well have found that the yearlings were worth less than twenty-five dollars, there being no direction to the jury to find for the defendant as to the cow and no direction as to finding the value of the yearlings separate from the cow. *Pitts v. State*, 189.

7. *Intoxicating liquors. Illegal possession. Sufficiency.*

A conviction of the illegal possession of liquors could not be sustained under the Laws of 1916, chapter 103, where the agreed statement of facts showed that an officer went to defendant's store and there caught a small boy carrying out a package containg unlawful quantities of liquor, which had been given him by a third party in the store other than the defendant and it was not shown that such third party had any connection with the store or with the defendant, or that defendant had any connection with the liquor. *Romano v. State*, 192.

8. *Criminal law. Documentary evidence. Judicial records.*

Where on a trial in the circuit court for forgery the indictment alleged that the perjury, occurred in a trial of a civil case before a justice of the peace, it was reversible error for the state to fail to introduce as evidence the record of the judgment of the justice of the peace showing the trial had in the justice court, since the trial of a civil case before a justice of the peace cannot be proven by oral testimony but must be shown by the official record of the judgment rendered in the trial in that court, if obtainable. *Harrington v. State*, 205.

9. *Master and servant. Evidence of want of skill. Statute.*

Laws 1912, chapter 215, providing that in all actions against railroads proof that the injury was inflicted by the running of an

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EVIDENCE.

EVIDENCE—Continued.

engine or cars shall be *prima-facie* evidence of want of skill and care, being but a rule of evidence, is applicable to a case brought under the Federal Employers' Liability Act (Act April 23, 1908, ch. 149, 35 Stat. 65, U. S. Comp. St. 1916, sections 8657-8655) since in all matters of procedure the *lex fori* governs. *N. O. & N. E. R. Co. v. Scarlet*, 285.

10. *Parol evidence.*

Parol evidence is admissible to show the unlawful purpose for which a lease was made. *Lavecchia v. Tillman*, 288.

11. *Burglary. Sufficiency.*

Where on a trial for burglary the evidence showed that a warehouse was robbed of certain groceries; that defendant had in his possession, groceries of the same description in large quantities a day or two after the storehouse was robbed; but there was no evidence that a lock had been broken or windows raised, and the only testimony introduced by the state to show that the store had been robbed was that the porter of the warehouse testified that when he unlocked the warehouse at the usual time in the morning he noticed certain boxes had been broken open and a large part of the contents removed. This evidence was insufficient to establish a breaking and entering of the warehouse from which the articles were alleged to have been stolen. *Gilford v. State*, 300.

12. *Master and servant. Injuries to servant. Negligence.*

Under section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence on the part of the railroad company, where the whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars, the burden is upon the railroad to explain the injury and show how it occurred and failing to do this the court should give a peremptory instruction to find for the plaintiff. *Y. & M. V. R. R. Co. v. Mullins*, 343.

13. *Master and servant. Injuries to servant. Negligence.*

Section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence, is applicable as a rule of evidence in the courts of this state, regardless of whether the cause of action arises under the Federal Employer's Liability Act (Act April 22, 1908C 149, 35 Stat. 65 U. S. Comp. St. 1916, sections 8657-8665) or under the state law. Ib.

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EVIDENCE.

EVIDENCE—Continued.

14. *Bank and banking. Action against president. Agreement dismissing appeal.*

Where the president of a bank had taken up his own loan with the money of the bank with knowledge of the infirmities of the title and the bank had been unable to realize in full on the loan because of the title set up by others, an agreement to dismiss the appeal from the decree adjudging that the bank had knowledge of the infirmities in the title was admissible in a suit in which the bank sought to hold the president liable for making such loan. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

15. *Banks and banking. Action against president. Evidence. Agreement dismissing appeal.*

In such case the decree in the suit between the bank and the others, adjudging that the bank had knowledge of the infirmities in the title, was admissible in the suit in which the bank sought to hold the president liable for making the loan. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

16. *Judgment. Res judicata.*

To sustain a plea of *res adjudicata*, the evidence must show that the cause of action is the same. *Eminent Household of Columbian Woodmen v. Bunch*, 512.

17. *Insurance. Total disability.*

The fact that insured resigned his office of justice of the peace should not discount his claim of permanent and total disability or impeach his testimony. If his physical condition was such that he could not perform, in the main, the duties imposed by law, then he was not only justified in resigning but it was his duty so to do. *Ib.*

18. *Value. Price at which property is offered for sale.*

On an appeal from a municipal assessment for taxes on a cotton compress and warehouse, it was competent for the owners to introduce evidence that they were willing to sell and had offered to sell it for a less price than the amount of the assessment, where there was evidence that such offer was not in the nature of a forced sale; but was a *bona-fide* offer by the owners and in their opinion was a just valuation of the property in view of prevailing conditions. *Gloster Compress & Trading Co. v. Mayor & Aldermen of Town of Gloster*, 578.

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EVIDENCE.

EVIDENCE—Continued.

19. *Presumptions. Intent.*

The presumption of law is that every man intends to do what he does do, and in the absence of the proper showing of honest mistakes, the defendant would be held to have wilfully done what he did do. *Bates v. Brevard-Woods Stave Co.*, 588.

20. *Bills and notes. Conflict in evidence. Question for jury.*

Where, in a suit on a note by the assignee thereof, the defendant maker pleaded as a set-off certain notes assigned to him by plaintiff's assignors and there was a material conflict in the evidence as to whether the notes pleaded by defendant as set-offs were assigned to him with the understanding that plaintiff's assignors would be responsible for their payment and as to whether there was a demand for payment on the makers and as to whether plaintiff promised to pay them after knowledge of the makers' default in payment. In such case a peremptory instruction should not have been given but the case should have been submitted to the jury. *Council v. Murphy*, 593.

21. *Judicial notice. Market for blooded hunting dogs.*

The court officially knows that blue-blooded hunting dogs have a market. *Greenwald v. Y. & M. V. R. Co.*, 598.

22. *Sale. Unconditional delivery to consignee. Bill of lading.*

Where a carload of lumber was delivered to a railroad for shipment to the buyer thereof, and the bill of lading for the same named the buyer as consignee, in such case the bill of lading was *prima-facie* evidence of an unconditional delivery to the consignee. *Merchants & Mfgrs. Bank of Ellisville v. Tooner Lbr. Co.*, 647.

23. *Homicide. Dying declarations. Statement of fact.*

A dying declaration that defendant "shot me and didn't have any cause" is not inadmissible as merely an expression of an opinion but was the statement of a fact. *McNeal v. State*, 678.

24. *Homicide. Dying declarations. Competency.*

Where the state offers to introduce a dying declaration in evidence, the burden is upon the state to show that at the time the declaration was made, the deceased believed that he was going to die and had no hope whatever of recovery, it must be made under the realization and solemn sense of impending death. *Ib.*

25. *Same.*

Where deceased says nothing about death, but prays the Lord, "who had helped him before," his declaration is not admissible. *Ib.*

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EVIDENCE—Continued.

26. *Same.*

A statement, "I won't be with you much longer, I have got to leave you; O Lord, what a pity for Frank Neal to shoot a poor boy like I am for nothing. I never done anything to Frank"—was a mere exclamation of pity and was not admissible as a dying declaration. *McNeal v. State*, 678.

27. *Executors and administrators. Disputed claims. Sufficiency of evidence.*

In this case, which was a dispute as to the allowance of a claim against the estate of a decedent, the court held that there was sufficient evidence to require the administrator to introduce evidence to overcome it. *Loviza v. Lynch*, 694.

28. *Criminal law. Confessions. Corpus delicti. Arson.*

The *corpus delicti* must be proven by evidence *aliunde* the confessions of the accused. *Rayborn v. State*, 730.

29. *Trover and conversion. Taking of property. Sufficiency.*

The court held that the evidence set out in the opinion was sufficient in this case to show that the plaintiff in replevin to whom one defendant gave the property for which the other defendant sued in trover, lost the property replevied through the act of some person without authority of law. *Abasi Bros. v. L. & N. R. Co.*, 803.

30 *Sale. Signing or authorizing letter. Question of fact. Modification.*

Under the facts as set out in its opinion in this case the court held that the letter constituting a contractual offer purporting to be signed by the buyer on a typewriter, was *prima-facie* evidence of his having written or authorized it, and his dispute of this fact raised a question of fact that should have been submitted to the jury. *Edward Thompson Co. v. Foy*, 848.

See ASSIGNMENTS; MASTER AND SERVANT; NEGLIGENCE.

EXECUTORS AND ADMINISTRATORS.

1. *Right to possession of property against claim of third party. Protection of creditors. Statute.*

Under Code 1906, section 4784, commonly known as our "sign statute," an administratrix could maintain replevin for a stock of furniture held by deceased, who conducted the business of a trader in his own name, although another person had actually furnished the money for purchasing the stock, since presumptively the administratrix had the right of possession until all the creditors of deceased were paid, and it was immaterial that

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EXECUTORS AND ADMINISTRATORS—Continued.

no actual debts against the estate were shown, where the time allowed creditors to probate accounts had not expired. *Hunter v. Forrest*, 7.

2. *Same.*

In such case, where the property had been purchased by the defendant in the name of the deceased at the time of the bankruptcy of defendant's husband, and the husband had turned over his exemptions to deceased, and there was no distinction between this property and that purchased by the wife in deceased's name, and since the creditors could have proceeded against the stock during deceased's life, their rights must be protected, after his death. *Ib.*

3. *Same.*

In such case, it was immaterial that the heirs of deceased had no right to the stock, or that the bankrupt's wife, the real owner, could claim the property or any surplus thereof, after deceased's debts had been paid; the right of possession of the administratrix, upon which the cause of action depended being superior to that of the true owner of the stock, solely because of section 4784, Code 1906, and because the administratrix represents the interest of creditors. *Ib.*

4. *Sale of land. Existence of personalty.*

Under Code 1906, section 2075, authorizing a sale of land in preference to personalty where the court is satisfied that it would be to the interest of the distributees or legatee, the chancery court has jurisdiction on petition of an executor to decree a sale of realty, part of the *corpus* of the estate, where all necessary parties are before it, whether the property is devised by will or descends by operation of law. *Brickell v. Lightcap*, 417.

5. *Sale of realty. Parties interested. Annuitants. Contingent remaindermen.*

Under Code 1906, section 2079, providing that on petition to sell lands to pay debt of a decedent all parties interested shall be cited, and section 2056, charging lands of a decedent with the payment of his debts if the personalty is sufficient and section 2075 providing for a sale of realty in preference to personalty in certain instances, where a testator devised a residue of his property in trust to pay a certain sum out of the rents and profits to his son and his wife for life, without anticipation or liability for their debts, and provided that on the death of the survivor the trust should terminate and the property should vest in

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EXECUTORS AND ADMINISTRATORS—Continued.

their children and the descendants of their children, and on the death of the son without children, in testator's right heirs, and gave the trustees power to manage and sell. In such case on the petition of the executor for a sale of the realty, since the *cestui qui trust* were represented by the trustee neither they nor the contingent remainderman were owners or "parties interested," entitled to summons under the statute. *Brickell v. Lightcap*, 417.

6. *Power to borrow money. Decree of chancery court.*

Where under the will the executor and trustee had no authority to borrow money and pledge the stock of the estate as security therefor, they could not do so under an unauthorized decree of the chancery court. *Luckett v. Brickell*, 457.

7. *Disputed claims. Sufficiency of evidence.*

In this case, which was a dispute as to the allowance of a claim against the estate of a decedent, the court held that there was sufficient evidence to require the administrator to introduce evidence to overcome it. *Loviza v. Lynch*, 694.

8. *Limitation of actions. Limitation applicable. Claims for board and services.*

The statute of limitation of three years bars any claim against the estate of a decedent, that accrued three years prior to the date of his death. *Ib.*

EXEMPTIONS.

1. *Bankrupt's right to dispose of exempt property.*

After a bankrupt has successfully claimed property as exempt he has the right to dispose of it as he sees proper. *Hunter v. Forrest*, 7.

2. *Homestead. Abandonment. Liberal construction of laws.*

Homestead laws should be liberally construed for the exemptionist and an abandonment will not exist unless it is clear from the proof that the exemptionist has removed from the homestead with the intention of not returning. *Jackson v. Coleman*, 535.

3. *Homestead. Divorce. Alimony.*

A homestead where there are dependent children is not ordinarily subject to an execution for alimony, such a case not being among those named in Code 1906, section 2156, wherein the homestead is not exempt, and the court will not add to such exceptions. *Ib.*

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EXEMPTIONS—Continued.

4. *Homestead. Divorce. Alimony. Execution.*

Where there are dependent children, the homestead is not subject to a demand for alimony unless the pleadings and decree in the divorce proceedings describe and show the necessity for a lien on the homestead. *Ib.*

FALSE PRETENSES.

Property subject to lien. Statute.

Under Code 1906, section 1168, providing that if any person shall sell any property on which he knows there is a lien without informing the person to whom he sells, etc., of the existence of the lien, he shall be guilty of obtaining under false pretenses, whatever he receives from the person dealing with him. An indictment charging that defendant unlawfully, and feloniously sold property on which there was a valid lien, without informing the purchaser of its existence defendant then and there well knowing the existence of the lien and that defendant did in that manner obtain fifteen thousand dollars of property of the purchaser, was a sufficient indictment under the statute. *State v. Fetterman*, 828.

FELONY, PREVENTION OF.

See HOMICIDE.

FORECLOSURE.

Mortgages. Foreclosure sale. Surplus. Recovery.

Where a bill was filed by a husband and wife charging that they executed a trust deed to secure a debt to defendant who on foreclosure, bid in the property for an amount greater than the debt, and that the sale was made subject to a prior deed of trust of an association and asking judgment for the surplus, and the defendant answered that he bid in the property under an arrangement by which he was to bid for them and take up the debt to the association, and there was evidence, that the trustee made the sale under the understanding as contended by the defendant and that a contract was signed by defendant and the husband pursuant to such arrangement and there was also evidence that the husband arranged with defendant to buy the property for him and that there was no such understanding until after the sale, and there was no evidence conveying knowledge of this arrangement to the wife except that the husband usually attended to the wife's business. In such case judgment for the wife for one-half of the surplus was erroneous, the chancellor

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FORECLOSURE—Continued.

either should have set aside the sale to defendant as being made under a mistake of fact or else should have held defendant to his bid and allowed both the husband and wife to recover the difference, and charged them with the rent between the time of sale and judgment and given defendant possession of the property by degree. *Browne v. Sanders*, 757.

FORFEITURE.

Intoxicating liquors. Transporting liquors. Forfeiture of vehicles. Statute.

Under Laws 1916, chapter 103, section 16, providing for the forfeiture of vehicles used in violating the liquor laws, this statute supplementing Code 1906, section 1750, providing that proof that the car was not used with the owner's knowledge or consent shall be a complete defense, where in a suit by the state for the forfeiture of a vehicle used in transporting intoxicating liquors, the undisputed facts showed that neither the taxicab owner, nor chauffer knew that a passenger was using the car to transport intoxicating liquors and that the owner had not been negligent in employing the chauffer and had directed him not to use the car for such illegal purposes, in such case the court could not order the car forfeited and destroyed. *Aldinger v. State*, 314.

FORGERY.

1. *Indictment. Extrinsic explanatory facts.*

Where extrinsic facts are necessary to be known and considered along with the writing, in order to constitute forgery, an indictment therefor must set out such facts as well as the instrument itself. *May v. State*, 708.

2. *Same.*

In a prosecution for unlawfully uttering a forged check signed "T. A. Bowels," the indictment alleging that the check was a forged check and that defendant intended to defraud certain parties, among others the bank on which the check was drawn and "T. A. Bowels," the indictment should have alleged the extrinsic explanatory facts that a person by the name of "T. A. Bowles, lived in another town and that defendant, when he cashed the check, told the person who cashed it that it was Bowles' check. *Ib.*

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FRAUD—GARNISHMENT.

FORGERY—Continued.

3. *Uttering forged instruments.. Instruction. Statutes.*

In a prosecution, under section 1192, Code 1906, for unlawfully uttering and publishing a forged check, an instruction for the state which, while attempting the statutory definition of the offense, omitted to state that the check was uttered "with intent to defraud" was erroneous. *Ib.*

FRAUD.

Trusts. Testamentary trustee. Sale of land. Presumption.

The fact that a trustee, acting with the executor and another trustee in petitioning for a sale of realty to pay debts, had a probated account against the estate, was not sufficient to show fraud, since his good faith will be presumed. *Brickell v. Lightcap*, 417.

See CONSIDERATION.

FRAUDS, STATUTE OF.

Oral contract. Validity.

Under Code 1906, section 4779, so providing, a verbal contract for the sale of goods is binding on the purchaser where he accepts and pays for a part of the same and he cannot cancel the order as to the balance of the goods though the contract is not in writing. *Walker Bros. & Co. v. Daggett*, 657.

See SALES.

GARNISHMENT.

1. *Answer. Sufficiency. Statute.*

Under our statute on garnishments, it is the duty of the garnishee to expressly admit or deny any indebtedness to the defendant in attachment or execution as the case may be, and upon his failure so to do the plaintiff is entitled to a judgment by default unless the answer contains sufficient matter to entitle the garnishee to amend, in which event the plaintiff must except thereto, and if the exception should be sustained by the court, leave should be given to the garnishee to answer over, and upon his failure so to do judgment should be rendered against him by default for want of a sufficient answer. *Mechanics & Traders Ins. Co. v. Butler*, 476.

2. *Same.*

Where the answer of the garnishee simply amounts to an allegation that he is unable to say whether or not he is indebt-

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ed to the defendant, but that in the event he should afterwards ascertain that he is so indebted he will with the permission of the court, file an amended answer setting that fact forth. In such case the proper course for plaintiff to pursue with such answer is to except thereto, which exception should be sustained by the court and judgment for want of a sufficient answer awarded, unless the garnishee ask leave to amend, in which event he should be permitted so to do, and if dissatisfied with the amended answer plaintiff should then take issue upon the answer and the cause should then proceed to trial thereon. *Mechanics & Traders Ins. Co. v. Butler*, 476.

3. *Same.*

Where the answer of the garnishee requested permission to file amendments thereto at a later day thereby continuing the case in court until it should be disposed of in a proper manner, it was not necessary for exceptions to have been filed at the same term at which the answer was filed. *Ib.*

4. *Answer. Judgment.*

Under our garnishment statute, an answer of garnishees admitting an indebtedness due the defendant and alleging that it was subject to certain attachments was too vague and indefinite to raise an issue relative thereto, so that plaintiff was entitled to judgment on the answer for the amounts admitted to be due. *Ib.*

5. *Answers. Contest. Statute.*

In such case, the plaintiff lost the right to contest such answer, and obtain judgment for larger sums than those admitted to be due by the answer, where he did not contest the answer of the garnishee during the term at which it was filed, or obtain leave from the court to contest it, at a subsequent term, since under section 2353, Code, 1906, the garnishee's answer must be contested at the term at which it was filed or leave then obtained from the court to contest the same at a subsequent term. *Ib.*

GUARANTY.

1. *Offer and acceptance.*

Where a traveling salesman who received a commission on sales and was therefore pecuniarily interested in the acceptance of orders taken by him, not only recommended, to his house the acceptance of an order, but stated that as to all orders sent in, "I know they are all O. K. and any I sell I am willing to guarantee payments of their bill," and his employers extended the credit; in such case there was an acceptance of the offer to guarantee

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GUARANTY—Continued.

and the letter and the acceptance created the relationship of guarantor and guarantee. *Richmond Paper Co. v. Bradley*, 307.

2. *Discharge of guarantor. Proving claim against bankrupt debtor.*

The probation of a creditor's claim in bankrutpcy against the estate of his debtor and the acceptance of a dividend will not preclude the creditor from relying on the guaranty. *Richmond Paper Co. v. Bradley*, 534.

GUARDIAN AND WARD.

Loss of money by guardian. Liability of surety.

Under Laws 1914, chapter 201, providing that when the chancellor designates the person to whom the money of the ward shall be loaned and the loan is so made, responsibility shall not thereafter attach to the guardian, where pursuant to an order of the chancellor permitting the guardian to place a sum of money in a named bank or other safe bank and providing that the "court does not relieve" the guardian or his bondsmen the guardian deposited the money of his ward in the named bank. In such case his sureties on his bond were not liable for loss of the ward's money due to the failure of the bank, the court having no power to add to their liability under the statute without their consent. *Cohn v. Winslow*, 275.

HIGHWAYS.

1. *Taxation. Statute.*

Chapter 177, Laws 1916, authorizing highway taxation if a county board of supervisors should elect to proceed under it, is independent of the last 11 sections of the Code, chapter on "Roads, Ferries and Bridges," and is not limited by Code 1906, section 4469, limiting taxation to three mills on the dollar, since such limitation relates to another and entirely distinct method of highway taxation. *Martin v. Little*, 195.

2. *Taxes. Validity.*

A two-mill road tax is valid under section 4469, Code 1906, provided the roads of a county are being worked by contract in accordance with section 4465 of the Code, and until the contrary appears the court must presume that they were being so worked. *Y. & M. V. R. Co. v. Grenada County*, 238.

3. *Road tax. Liability for commutation.*

Under Code 1906, section 4442, declaring that if a public road be worked and kept up by contract the road hands designated by

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HIGHWAYS—Continued.

the board shall work under the contractor or pay commutation money to him; where the board of supervisors contracts for the working of roads, and designate and assign the road hands as required by this section and furnish to the contractor a correct and proper list of such road hands which is accepted by him, the work or commutation tax due by such hands "shall be estimated as a part of the whole of the contractor's renumeration according to the contract "and the contractor is chargeable with the work or commutation tax due by each road hand on the list, provided the board of supervisors had not by its own acts or conduct prevented the contractor from obtaining the work or collecting the commutation tax due from the hands; and provided, further, that the contractor could secure the work or collect the tax by reasonable effort and due diligence on his part, but where the contractor has performed his duty in good faith in the collection of the road duty or commutation tax, and has failed to make all of the collections on the list, then he would be entitled to credit for all the work or commutation tax that he failed to collect for any cause over which he had no control. *Thomason v. Board of Sup'rs of Lawrence County*, 293.

4. *Same.*

The fact that the contractor accepts the list of hands and undertakes to collect the tax according to the list does not bind him for the full amount charged to him on the list unless he collects the same, or unless it appears that his failure to do so was his own fault or negligence. *Ib.*

5. *Taxation. Distribution by counties. Code* 1906, *sections* 4443-4469.

The statutory scheme, Code 1906, section 4443, relating to the levy of road taxes by a board of county supervisors and section 4469, relating to the road fund, contemplates that the board of supervisors shall supervise the distribution of the funds otherwise there would be no record thereof. *Town of Crenshaw v. Panola County*, 891.

6. *Road tax. Liability to town. Amount.*

Under section 4443, Code 1906, authorizing a county to levy a road tax on all the taxable property of the county and section 4469, providing for the distribution of the road fund, a county collecting a road tax on property within the corporate limits of a town and which had not spent any of the money on working the streets of the town must pay over to the town one half of the road taxes collected therein. *Ib.*

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HOLOGRAPHIC WILLS.

Wills. Subscribed.

Where a will is probated as a holographic will, it must be not only written, but "subscribed" by the testator under Code 1906, section 5078, so providing. *Better v. Hirsch*, 614.

HOMESTEAD.

1. *Abandonment. Liberal construction of laws.*

Homestead laws should be liberally construed for the exemptionist and an abandonment will not exist unless it is clear from the proof that the exemptionist has removed from the homestead with the intention of not returning. *Jackson v. Coleman*, 535.

2. *Abandonment. Statutes.*

A widower, who, being unable to work on account of rheumatism, left his farm and leased it for five years in order to support his children from the rent and who tried to regain possession of the farm after he was better, did not abandon his homestead within the meaning of the Code 1906, section 2157, in relation to exemptions. *Ib.*

3. *Divorce. Alimony. Execution.*

A homestead where there are dependent children is not ordinarily subject to an execution for alimony, such a case not being among those named in Code 1906, section 2156, wherein the homestead is not exempt, and the court will not add to such exceptions. *Ib.*

4. *Divorce. Alimony. Execution.*

Where there are dependent children, the homestead is not subject to a demand for alimony unless the pleadings and decree in the divorce proceedings describe and show the necessity for a lien on the homestead. *Ib.*

HOMICIDE.

1. *Self defense.*

If a defendant's life was in real or apparent danger at the hands of deceased, and he believed it, then he had a right to shoot to kill. *McNeal v. State*, 678.

2. *Justifiable homicide. Preventing felony.*

If a defendant charged with homicide believed and had reasonable ground to apprehend, a design upon the part of deceased, to violate the chastity of the women in his house, and that there was imminent danger of this design being accomplished, then he had the right to shoot the deceased. *Ib.*

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HOMICIDE.

HOMICIDE—Continued.

3. *Dying declarations. Statement of fact.*

A dying declaration that defendant "shot me and didn't have any cause" is not inadmissible as merely an expression of an opinion but was the statement of a fact. *McNeal v. State*, 678.

4. *Dying declarations. Competency.*

Where the state offers to introduce a dying declaration in evidence, the burden is upon the state to show that at the time the declaration was made, the deceased believed that he was going to die and had no hope whatever of recovery, it must be made under the realization and solemn sense of impending death. *Ib.*

5. *Same.*

Where deceased says nothing about death, but prays the Lord, "who had helped him before," his declaration is not admissible. *Ib.*

6. *Same.*

A statement, "I won't be with you much longer, I have got to leave you; O Lord, what a pity for Frank Neal to shoot a poor boy like I am for nothing. I never done anything to Frank"—was a mere exclamation of pity and was not admissible as a dying declaration. *Ib.*

7. *Manslaughter. Instructions. Defense.*

An instruction for the state defining manslaughter as killing "in the heat of passion without malice," at a time when defendant was in no danger at the hands of deceased but omitting "without authority of law" was erroneous, where defendant relied not only on self-defense but also on the defense of killing to prevent a felony, as such an instruction might lead the jury to understand it as a practical exclusion of the latter defense. *Ib.*

8. *Instructions. Right of accused to arm himself. Self-defense.*

Where in a prosecution for murder, the jury could have found from the evidence, that defendant provoked the difficulty with the deceased by going into the house and attempting to shoot him, but failing so to do, abandoned the difficulty and fled and while attempting in good faith to escape, was pursued and attacked by deceased and forced to kill him in self-defense, in such case it was error for the court to instruct the jury for the state, that defendant could not arm himself with a deadly weapon with the intention of using it to overcome his adversary if necessary and go upon deceased's premises and provoke a difficulty with him, slay him and then claim self-defense. *Williamson v. State*, 716.

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IDEMS SONANS.

Names.

The words "bowles" and "bowels" are not *idem sonans;* the first being a word of one syllable and the second a word of two syllables. The different positions of the letter "l" in the two words make two entirely different words. *May v. State,* 708.

IMPROVEMENTS.

See MUNICIPAL CORPORATIONS.

INDICTMENT.

1. *Larceny. Sufficiency. Dollar. Statute.*

Under Code 1906, section 1436, providing that in indictments for larceny or embezzlement of money, it shall be sufficient to describe the property in general terms as money, etc., of or about a certain amount and of certain value, an indictment which charged that defendant stole seventy-seven dollars and fifty cents of the value of seventy-seven dollars and fifty cents which was the property of another, was sufficient to charge an offense, though not specifically alleging that the property stolen was money, since the description of it as seventy-seven dollars and fifty cents of the value of seventy-seven dollars and fifty cents, identified it as money, for when we speak of dollars and cents we are speaking of money. *State v. Walker,* 700.

2. *Animals. Registration. Offenses. Statute.*

Under Code 1906, section 1055, providing that every dealer in live stock who shall fail to enter in a book the names of all persons from whom he buys, and a description by marks and otherwise of all animals bought or kept by him for slaughter, shall be punished, an indictment, charging that accused, then and there being a dealer in live stock, unlawfully failed to keep any record of stock bought or sold, and thereby did not enter the names of all persons from whom he bought such stock and a description by marks and brands or otherwise of all animals bought, is insufficient, where it was not alleged that defendant in fact bought cattle, sheep, etc., and failed to register the names of the persons from whom he bought them. *State v. Edwards,* 704.

3. *Forgery. Extrinsic explanatory facts.*

Where extrinsic facts are necessary to be known and considered along with the writing, in order to constitute forgery, an indictment therefor must set out such facts as well as the instrument itself. *May v. State,* 708.

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INDICTMENT.—Continued.

4. *Same.*

In a prosecution for unlawfully uttering a forged check signed "T. A. Bowels," the indictment alleging that the check was a forged check and that defendant intended to defraud certain parties, among others the bank on which the check was drawn and "T. A. Bowels," the indictment should have alleged the extrinsic explanatory facts that a person by the name of "T. A. Bowles, lived in another town and that defendant, when he cashed the check, told the person who cashed it that it was Bowles' check. *May v. State*, 708.

5. *Forgery. Variance.*

Where there is a variance between the indictment and the proof, a motion by the defendant to exclude the testimony of the state should be sustained. *Ib.*

6. *False pretenses. Property subject to lien. Statute.*

Under Code 1906, section 1168, providing that if any person shall sell any property on which he knows there is a lien without informing the person to whom he sells, etc., of the existence of the lien, he shall be guilty of obtaining under false pretenses, whatever he receives from the person dealing with him. An indictment charging that defendant unlawfully, and feloniously sold property on which there was a valid lien, without informing the purchaser of its existence defendant then and there well knowing the existence of the lien and that defendant did in that manner obtain fifteen thousand dollars of property of the purchaser, was a sufficient indictment under the statute. *State v. Fetterman*, 828.

INJUNCTION.

1. *Judgments. Conclusiveness. Matters not decided. Damages.*

Where a chancellor in dismissing a suit wherein a temporary injunction had been issued, did not pass upon the question of damages, that matter was not *res adjudicata*. *Alexander v. Woods*, 164.

2. *Action for wrongful injunction. Dismissal of suit.*

Under Code 1906, section 624, providing that the party claiming damages upon the dissolution of an injunction may have the same determined and decreed by the chancellor, but that nothing contained in such section shall prevent the party from maintaining a suit on the injunction bond if his damages shall not be assessed as provided for in the act. Where a suit in which

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INJUNCTION—Continued.

a temporary injunction had been issued was dismissed, which established the fact that the injunction had been wrongfully sued out, the defendants in such suit were entitled to recover damages on the bond, which they sustained by the issuance of the writ. *Ib.*

3. *Dissolution by dismissal of suit.*

The dismissal of a bill in chancery operates as a dissolution of a temporary injunction granted thereunder. *Ib.*

4. *Insurance. Consent to appraisement. Effect.*

Where the owner obtained a policy of fire insurance covering her residence and household furniture with a mortgage clause covering the residence and there was no dispute that there was a total loss of the furniture, but there being some dispute that there was a total loss of the residence the owner and the company's agent had an appraisement made, she agreeing to settle for an amount less than that stated in the policy, but the mortgagee refused to settle on the report of the appraisers and brought suit claiming a total loss of the residence. In such case though the appraisement was not binding on the mortgagee who might eventually recover more than the amount fixed by the appraisement, the insurer could not enjoin action for the furniture loss by the owner pending the mortgagee's action, and thereby enforce a set-off for the difference between the amount fixed by the appraisement and the mortgagee's recovery. *Aetna Ins. Co. v. Pelham,* 229.

5. *Wrongful injunction. Damages. Attorney fees.*

In an action for damages for the wrongful suing out of an injunction preventing defendant's delivery of lumber, which it had sold to others, the measure of damages, as to attorney fees, where the bill was demurred to is the reasonable amount of attorney fees for the hearing of the demurrer to the bill in the court below and in the supreme court on appeal, but no allowance should be made for services in a suit which arose subsequent to the dissolution of the injunction. *Thornton-Cloney Lumber Co. v. O'Quin & Sons,* 857.

6. *Same.*

In such case the damages after allowing attorney fees, would be the difference in the value of the lumber at the time of the suing out of the injunction and its value at the period of dissolution, with interest on the difference from the date of the suing out of the injunction. *Ib.*

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INJUNCTION—Continued.

7. *Sale of timber. Forfeitures. Accounting.*

Where under a contract for the sale of standing timber, defendant was to make certain improvements as a part consideration within two years or forfeit a deposit, and there was a further subsequent contract that the improvements should be made before a certain date, but not referring to the forfeiture named in the first contract, it was erroneous for the court to grant an injunction against further cutting and decree cancellation of defendant's claim before the two years for performance had expired, or, if cancellation was to be had in not awarding to defendant the consideration paid, as a consideration of cancellation, or in not ordering an accounting to see whether any sum was due defendant under the contract. *McClurg v. Hicks*, 879.

INSURANCE.

1. *Consent to appraisement Effect.*

Where the owner obtained a policy of fire insurance covering her residence and household furniture with a mortgage clause covering the residence and there was no dispute that there was a total loss of the furniture, but there being some dispute that there was a total loss of the residence the owner and the company's agent had an appraisement made, she agreeing to settle for an amount less than that stated in the policy, but the mortgagee refused to settle on the report of the appraisers and brought suit claiming a total loss of the residence. In such case though the appraisement was not binding on the mortgagee who might eventually recover more than the amount fixed by the appraisement, the insurer could not enjoin action for the furniture loss by the owner pending the mortgagee's action, and thereby enforce a set-off for the difference between the amount fixed by the appraisement and the mortgagee's recovery. *Aetna Ins. Co. v. Pelham*, 229.

2. *Fire insurance. Additional insurance clause. Waiver.*

A provision in a fire insurance policy that it should be void if insured should procure any other insurance on the property in excess of one thousand dollars, is not waived by the insurer's agent offering insured an additional policy of another company for a greater amount than permitted by the first policy, where neither the insurer nor the agent knew that additional insurance had been taken out by insured after the fire, and insured was fully aware that he was bound by his contract. *Palatine Ins. Co. v. Smith McKinnon & Son*, 324.

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INSURANCE.

INSURANCE—Continued.

3. *Forfeiture of fire policy. Estoppel Konwledge of agent.*

An insurer is bound by its agent's knowledge, and is estopped from claiming a forfeiture of a policy where its agent who solicited a renewal of a fire insurance policy, inspected the risk, receipted for the premium, and delivered the policy, had knowledge that the insured did not keep an iron safe as stipulated for in the policy, similar conditions having existed in the case of the previous policy and in such case it was immaterial whether the agent was a soliciting agent or a general agent of his company, since he was the only agent with whom the insured dealt. *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 333.

4. *Fraud. Question for jury.*

In a suit upon a life insurance policy, the question of fraud by the insured in making his application for insurance, was properly submitted to the jury, where there was a conflict in the testimony as to whether or not deceased knew of his malady at the time he applied for the insurance. *N. Y. Life Ins. Co. v. Montgomery*, 350.

5. *Judgment. Res judicata. Health insurance. Disability.*

The fact that plaintiff brought a suit on a health insurance policy for permanent total disability in which it was determined that he was not totally disabled, did not preclude him thereafter from instituting another suit upon the policy whenever the condition of permanent and total disability did exist and could be proven; although the infirmities proven in the second trial were the same as in the first except that they had grown worse. *Eminent Household of Columbian Woodmen v. Bunch*, 512.

6. *Total disability.*

The fact that insured resigned his office of justice of the peace should not discount his claim of permanent and total disability or impeach his testimony. If his physical condition was such that he could not perform, in the main, the duties imposed by law, then he was not only justified in resigning but it was his duty so to do. *Ib.*

7. *Health insurance. Policy. Construction.*

Under an insurance policy, giving half the total insurance for the loss of an eye with the option "to continue this covenant in force, till death" when the other half will be paid, where insured collected one-half of the policy for the loss of an eye, this did not convert the remainder, into an ordinary life policy, and prevent recovery for further accidents, since the clauses of the policy

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INSTRUCTIONS.

INSURANCE—Continued.

conferring the right of recovery for the loss of an eye and the right to recover for total disability constitute separate and valuable provisions, and rights and contracts of this character should be construed most strongly against the company and in favor of the insured. *Eminent Household of Columbian Woodmen v. Bunch*, 512.

8. *Accident. Partial disability. Later permanent disability.*

Under an accident insurance policy providing for indemnity for partial and total disability, where insured received indemnity for the loss of an eye and broken leg, he may still recover for permanent total disability, although the lost eye and broken leg contribute to the permanent total disability. *Ib.*

9. *Policies and by-laws. Which prevail.*

If there is a conflict between an insurance policy and the by-laws of the association, and the policy as issued is within the power of the association under its charter or articles of organization, the policy must prevail. *Ib.*

10. *Accident insurance. Permanent disability.*

An insured is entitled to recovery under an accident insurance policy providing for indemnity for permanent disability where he is shown to be old, practically blind, a paralytic and cripple. *Ib.*

11. *Forfeiture. Waiver and estoppel. Knowledge of agent.*

Under Code, 1906, section 2615, defining who are the agents of insurance companies and their powers, where the soliciting agents of a fire insurance company at the time the risk was accepted knew that the owner did not have and did not intend to have an iron safe and told him it was unnecessary to have such safe, such statement became and was the act of the insurance company, and it was bound in such case both upon waiver and estoppel. *Big Creek Drug Company v. Stuyvesant Insurance Co.*, 561.

INSTRUCTIONS.

1. *Libel and slander. Actionable words. Insulting language.*

In such case it was error for the court to instruct the jury to find for the defendant unless they believed the words used were spoken in an insulting manner. *Nabors v. Mathis*, 564.

2. *Damage. Killing valuable dog on track.*

In a suit for damages for the negligent killing of a blooded pointer dog where the evidence showed that there was no local market

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for such dogs, the court should have instructed the jury to fix the value of the dog at such sum as the evidence showed that a man who wanted to buy such a dog would be willing to pay for same; and to aid the jury in arriving at the value of the dog, the court should permit the jury to consider the testimony as to the values of such dogs in other places, wherein the owner might find a purchaser. *Greenwald v. Y. & M. V. R. Co.*, 598.

3. *Damages. Medical attention. Evidence.*

In a suit for damages for personal injury where the evidence showed that plaintiff received medical attention and that her husband bought some medicine for her, an instruction for the plaintiff allowing the jury to take into consideration the expense of medical attention as an element of damages, was not reversible error, although the doctor attending her testified that he had not entered any charge for his service because the husband, though willing, was unable to pay for same. *Thomas v. Weeks*, 602.

4. *Homicide. Manslaughter. Defense.*

An instruction for the state defining manslaughter as killing "in the heat of passion without malice," at a time when defendant was in no danger at the hands of deceased but omitting "without authority of law" was erroneous, where defendant relied not only on self-defense but also on the defense of killing to prevent a felony, as such an instruction might lead the jury to understand it as a practical exclusion of the latter defense. *McNeal v. State*, 678.

5. *Forgery. Uttering forged instruments. Statutes.*

In a prosecution, under section 1192, Code 1906, for unlawfully uttering and publishing a forged check, an instruction for the state which, while attempting the statutory definition of the offense, omitted to state that the check was uttered "with intent to defraud" was erroneous. *May v. State*, 708.

6. *Homicide. Right of accused to arm himself. Self-defense.*

Where in a prosecution for murder, the jury could have found from the evidence, that defendant provoked the difficulty with the deceased by going into the house and attempting to shoot him, but failing so to do, abandoned the difficulty and fled and while attempting in good faith to escape, was pursued and attacked by deceased and forced to kill him in self-defense, in such case it was error for the court to instruct the jury for the state, that defendant could not arm himself with a deadly weapon

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INSTRUCTIONS—Continued.

with the intention of using it to overcome his adversary if necessary and go upon deceased's premises and provoke a difficulty with him, slay him and then claim self-defense. *Williamson v. State*, 716.

See APPEAL AND ERROR; EVIDENCE; LARCENY; NEGLIGENCE; TRIALS.

INTOXICATING LIQUORS.

1. *Illegal possession. Evidence. Sufficiency.*

A conviction of the illegal possession of liquors could not be sustained under the Laws of 1916, chapter 103, where the agreed statement of facts showed that an officer went to defendant's store and there caught a small boy carrying out a package containing unlawful quantities of liquor, which had been given him by a third party in the store other than the defendant and it was not shown that such third party had any connection with the store or with the defendant, or that defendant had any connection with the liquor. *Romano v. State*, 192.

2. *Transporting liquors. Forfeiture of vehicles. Statute.*

Under Laws 1916, chapter 103, section 16, providing for the forfeiture of vehicles used in violating the liquor laws, this statute supplementing Code 1906, section 1750, providing that proof that the car was not used with the owner's knowledge or consent shall be a complete defense, where in a suit by the state for the forfeiture of a vehicle used in transporting intoxicating liquors, the undisputed facts showed that neither the taxicab owner, nor chauffeur knew that a passenger was using the car to transport intoxicating liquors and that the owner had not been negligent in employing the chauffeur and had directed him not to use the car for such illegal purposes, in such case the court could not order the car forfeited and destroyed. *Aldinger v. State*, 314.

3. *Violation of liquor laws. Transportation. Presumption of knowledge.*

The fact that an automobile is used by a passenger for the unlawful transportation of intoxicating liquors makes out a *prima facie* case of the guilty knowledge of the owner of the vehicle, which may however be rebutted by proven facts in the case. *Ib.*

JEOPARDY.

Larceny. Sufficiency of evidence.

In such case the defendant could not plead former jeopardy as to the theft of the cows as there was no such description of the

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JUDGMENTS.

cow as could identify her when you take from the description the fact that she was owned by the person alleged to be the owner in the indictment. *Petts v. State*, 189.

JUDGMENTS.

1. *Conclusiveness. Matters not decided. Damages.*

Where a chancellor in dismissing a suit wherein a temporary injunction had been issued, did not pass upon the question of damages, that matter was not *res adjudicata*. *Alexander v. Woods*, 164.

2. *Equitable relief. Correction of errors of other courts.*

A court of equity is without power to correct mere errors alleged to have been made by another court in rendering a judgment in a cause of which it had full jurisdiction. The correction of such errors is committed solely to the supreme court on direct appeal thereto from the judgment or decree complained of. *Hinton v. Shedd, Sheriff*, 208.

3. *Courts. Erroneous decisions. Litigants.*

A litigant has no vested interest in a court's mistake where the mistake is discovered before the final ending of the litigation. *Brewer v. Browning*, 358.

4. *Equity. Decree. Amendment. Evidence.*

Under section 1016, Code 1906, providing that, when there shall be among the records of the proceedings any docket or memoranda by the chancellor whereby a judgment or decree may be safely amended, it shall be the duty of the court to amend such judgment or decree, it was not error for a trial court to overrule an application to amend a final decree, where although the former chancellor of the district stated in testifying that he made a pencil memorandum of his calculations at the time he prepared the final decree, these alleged notes of the chancellor were not made a part of the petition as an exhibit or otherwise and were not in the possession of the witness at the time he testified and were not in court when the motion was heard and had never been "among the record of the proceedings." *Merchants & Farmers Bank of Starksville v. Norment*, 409.

5. *Banks and banking. Action against president. Evidence. Agreement dismissing appeal.*

In such case it was error to attach to the decree in the suit, by which the bank sought to hold the president liable for making the loan the condition that so long as the former suit between the

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JUDGMENTS—Continued.

bank and the others was pending, no liability should rest or be vested. *Merchants & Farmers Bank of Starksville v. Norment*, 409.

6. *Same.*

In such case the decree in the suit between the bank and the others, adjudging that the bank had knowledge of the infirmities in the title, was admissible in the suit in which the bank sought to hold the president liable for making the loan. *Ib.*

7. *Bond to release money.*

Where in a suit by a bank against its president the bank prayed in its bill that the money of its president in the bank should be applied to the indebtedness due it by him and the president had given a bond for the release of this money, a decree was erroneous which failed to give judgment on such bond. *Ib.*

8. *Res judicata. Evidence.*

To sustain a plea of *res adjudicata*, the evidence must show that the cause of action is the same. *Eminent Household of Columbian Woodmen v. Bunch*, 512.

9. *Res judicata. Health insurance. Disability.*

The fact that plaintiff brought a suit on a health insurance policy for permanent total disability in which it was determined that he was not totally disabled, did not preclude him thereafter from instituting another suit upon the policy whenever the condition of permanent and total disability did exist and could be proven; although the infirmities proven in the second trial were the same as in the first except that they had grown worse. *Ib.*

10. *Process to support. Publication. Personal judgment.*

No personal judgment can be entered against a foreign corporation by publication of process only. *Columbia Star Milling Co. v. Brand*, 625.

11. *Sale. Breach. Remedies.*

In such case where, after judgment in the court below and pending an appeal to the supreme court, the seller had the goods involved in the suit and tendered to the buyer, removed from the warehouse of the common carrier, and returned to them and converted said goods to their sole use and benefit without the knowledge or consent of the buyer, the supreme court on motion will set aside its order entering judgment in that court and reverse and remand the cause. *Walker Bros. & Co. v. Daggett*, 657.

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JUDGMENTS—Continued.

12. *Appeal and error. Review. Reversal.*

Under Code 1906, section 2683, so providing, suit may be brought against one, some or all of persons jointly and severally liable, and since partners are jointly and severally liable, error in rendering judgment against several partners, two of whom were not served with process and did not appear, does not require a reversal as to the partner who was served, in view of section 4944, providing that one appealing party is not entitled to a reversal for error as to another party defendant. *Hattiesburg Hardware Co. v. Pittsburg Steel Co.*, 663.

13. *Counties. Judgment against. Enforcement.*

The mere authorization of suit against a county does not imply necessarily, a means of enforcement of a judgment therein obtained. When a judgment is rendered against a county, it is the duty of the board of supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power, it is their duty to levy a tax for that purpose but if they have no funds, and the power to levy the tax has not been delegated to them, such tax cannot be levied without express legislative authority. *Town of Crenshaw v. Panola County*, 891.

See COURTS; LIENS.

JUDICIAL NOTICE.

Evidence. Market for blooded hunting dogs.

The court officially knows that blue-blooded hunting dogs have a market. *Grenwald v. Y. & M. V. R. Co.*, 598.

JURISDICTION.

1. *Courts. Estoppel.*

In a suit by road contractors against a county, where, under their contract, they were entitled to a certain compensation, the fact that the board of supervisors of the county erroneously estimated the amount due the contractors at too high a figure, did not estop the county from afterwards questioning the jurisdiction of the court to try the case on account of the amount really involved. *Board of Sup'rs. of Lamar Co. v. Warden & Barrett*, 311.

2. *Judgments. Amount involved.*

Where the maximum recovery to which plaintiff was entitled was one hundred and thirty-eight dollars the circuit court was with-

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JURISDICTION—Continued.

out jurisdiction though the suit was brought for two hundred and ten dollars. *Board of Sup'rs. of Lamar Co. v. Warden & Barrett*, 311.

3. *Courts. Previous decisions as precedents. Power to overrule.*

Under Constitution 1890, section 144, vesting the judicial power of the state in the supreme court and such other courts as are provided for in the Constitution, and under section 146, providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals there is no limit of the appellate jurisdiction that may be conferred upon the supreme court, and such court has the power to overrule or change its decision whenever they are in its opinion erroneous or wrongful; and such change of decision would not violate the rule of *res adjudicata*. *Brewer v. Browning*, 358.

See COURTS; CONSTITUTIONAL LAW.

JURY.

1. *Exclusion from jury of conscientious objectors to capital punishment. Statutes.*

In a prosecution for murder it is proper for the court to exclude from the jury persons who state that they have conscientious scruples against the infliction of capital punishment, since sections 1229 and 1512, Code 1906, providing the method of fixing the punishment in such cases, do not deal with and have no bearing on the qualifications of jurors. *Borowitz v. State*, 47.

2. *Drawing jury. Prejudice. Evidence. Sufficiency.*

Under the facts of this case the court held, that defendant was not prejudiced by the fact that the plaintiff's brother who was the clerk of the board of supervisors was present, and assisted in the drawing of the juries for the term. *Ulmer v. Pistole*, 485.

3. *Verdict of nine jurors. Validity. Conclusiveness.*

A verdict in a civil case returned by nine jurors is valid and constitutional and the verdict cannot be impeached by any one of the twelve jurors on the jury. *Ib.*

JUSTIFIABLE HOMICIDE.

See HOMICIDE.

LANDLORD AND TENANT.

1. *Actions. Pleading. Sufficiency.*

A plea to an action for the balance of rent due under a lease, that the lease was void because the lease was entered into in

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LARCENY.

LANDLORD AND TENANT—Continued.

contemplation of the premises being used for the unlawful sale of intoxicating liquors, sets up a good defense. *Lavecchia v. Tillman*, 288.

2. *Evidence. Parol evidence.*

Parol evidence is admissible to show the unlawful purpose for which a lease was made. *Ib.*

3. *Chattle mortgage. Conversion of mortgaged property by mortgagor's landlord.*

Where a landlord having waived his lien except as to rent on the tenant's share of the crop, in favor of a deed of trust given by the tenant to a supply merchant, sold the cotton, raised on the rented premises, in his own name and after deducting moneys due him, paid the balance to the tenant knowing of the merchant's trust deed. In such case the landlord should have turned the money over to the merchant after deducting his land rent and his failure to do so was a conversion of the cotton for which he was liable to the merchant mortgagee. *Evans v. Carpenter*, 572.

LARCENY.

1. *Sufficiency of evidence.*

A conviction of grand larceny will be reversed on appeal where the indictment charged the larceny of three yearlings and a cow, described merely by the owner's name, and where the testimony showed that the cow did not belong to the party as charged in the indictment and the jury might well have found that the yearlings were worth less than twenty-five dollars, there being no direction to the jury to find for the defendant as to the cow and no direction as to finding the value of the yearlings separate from the cow. *Pitts v. State*, 189.

2. *Same.*

In such case the defendant could not plead former jeopardy as to the theft of the cows as there was no such description of the cow as could identify her when you take from the description the fact that she was owned by the person alleged to be the owner in the indictment. *Ib.*

3. *Indictment. Sufficiency. Dollar. Statute.*

Under Code 1906, section 1436, providing that in indictments for larceny or embezzlement of money, it shall be sufficient to describe the property in general terms as money, etc., of or about a certain amount and of certain value, an indictment which charged that defendant stole seventy-seven dollars and fifty

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LARCENY—Continued.

cents of the value of seventy-seven dollars and fifty cents which was the property of another, was sufficient to charge an offense, though not specifically alleging that the property stolen was money, since the description of it as seventy-seven dollars and fifty cents of the value of seventy-seven dollars and fifty cents, identified it as money, for when we speak of dollars and cents we are speaking of money. *State v. Walker*, 700.

LAWS CITED AND CONSTRUED.

Ch. 76-78 (1908). Telegraph and Telephones. Failure to transmit message. Statutes. *Western Union Telegraph Co. v. Meek*, 82.

LIENS.

1. *Sales. Conditional sale. Priority. Judgments. General liens.*

Where a jitney car company was engaged in two separate and distinct lines of business; first, operating automobiles and taxicabs for the carriage of passengers for hire in a city and vicinity; and second, trading in automobile supplies, and acquired a jitney bus and used it in its business of operating automobiles for hire, such bus did not come within the provision of section 4784, Code 1906, making property used in the business liable to creditors if a "business sign" is not displayed and in such case the lien of a judgment creditor must be postponed to the lien of the seller of the bus who sold with a reservation of title. *Orr v. Jackson Jitney Co.*, 140.

2. *Mechanics. Right to lien. Character of work. Personal property. Statute.*

Under section 3075, Code 1906, authorizing a mechanic who does work on personal property to retain it until his work is paid for, where such mechanic goes after and brings a car to his shop so that he might repair it, such service does not come within the provisions of the statute. *Ib.*

See FALSE PRETENSES; MORTGAGES.

LIBEL AND SLANDER.

1. *Words libelous per se.*

Where an insurance company issued a circular letter to its agents not referring to plaintiff by name, but referring to him as follows: "Living in a southern state, a hard drinker, a habitual carrier of fire arms, reputed to be twice a man killer, minus one foot when insured, none of these facts except the lost foot given

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LIENS.

us; represented by agent as a good risk, recently shot off his other, and makes claim accordingly." This language was not libelous *per se*, where plaintiff in his declaration substantially admitted all the statements therein, except that he denied he had killed two men, and claimed he had killed only one man, since the language used does not charge him with designedly shooting off his remaining foot for the insurance, but is consistent with an accidental shooting. *Holliday v. Maryland Casualty Co.*, 56.

2. *Charging special damages.*

A circular letter by an insurance company addressed to its agents only and not libelous *per se* is a qualified privilege communication and a declaration thereon for libel and slander was insufficient where it does not specifically state that any particular person, other than defendant's agents, ever saw or heard of the circular and did not allege except in a general way wherein plaintiff was injured in business or reputation. *Ib.*

3. *Actionable words. Insulting language.*

Under Code 1906, section 10, providing that all words which from their usual construction and common acceptation are considered as insults and calculated to lead to a breach of the peace shall be actionable, it was slanderous *per se* to say of a member of the legislature that he had received money to vote for an appropriation, since such language conveyed a direct charge that the plaintiff worked for and accepted a bribe. *Nabors v. Mathis*, 564.

4. *Same.*

In such case it was error for the court to instruct the jury to find for the defendant unless they believed the words used were spoken in an insulting manner. *Ib.*

LIENS.

1. *Logs and logging. Liens for labor. Statute.*

Under chapter 131, Laws 1908, employees of a sawmill have concurrent liens on their employer's lumber, which may be enforced as to all of them in one suit in chancery. *Cooley v. Tullas*, 268.

2. *Appeal and error. Reversal. Form of action.*

Under Constitution 1890, section 147, so providing, where the circuit court assumes jurisdiction of a cause of action to enforce the lien of employees of a sawmill against their employer's

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LIMITATION OF ACTIONS.

lumber under Laws 1908, chapter 131, and proceeds to judgment, it will not be disturbed on the ground that the action should have been brought in the chancery court. *Cooley v. Tullas*, 268.

LIMITATION OF ACTIONS.

1. *Pleading.*

The statute of limitations cannot be interposed by a demurrer but must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it. *Y. & M. V. R. Co. v. McGee-Dean Co.*, 282.

2. *Statute applicable. Implied contracts.*

The limitation of three years provided by section 3099, Code 1906, governs in an action by a railway company to recover freight charges, where the writings introduced in evidence do not set forth the terms of any contract entered into between the parties thereto, but simply show that the railway company collected from the shipper a less sum of money for transporting lumber than under the law, it should have done by reason of which the law imposes an obligation upon the shipper to account to the railway for the difference between the money which it actually paid and that which it should have paid, thereby giving rise to a contract the terms of which were not express, but only implied by law. *Pate Lumber Co. v. So. Ry. Co. in Miss.*, 402.

3. *Statute of limitations. New cause of action. Action for death. Computation of period. Amendments.*

Where a wife, as administratix of the estate of her deceased husband brought suit for his death within the two years allowed under the federal employer's liability act, and her declaration, though stating a cause of action under the state laws, did not bring her case under the operation of the federal act, an amendment of the declaration to bring the case within the federal employer's liability act (Act Cong., April 22, 1908, C. 149, 35 Stat. U. S. Comp. St. 1916, sections 8657-8665), by alleging that the injury resulting in the death of plaintiff's intestate occured while the parties were engaged in interstate commerce, instead of intrastate commerce, did not constitute a new cause of action, barring the suit under the limitations of two years and such amendment was properly allowed. *Broom v. So. Ry. in Miss.*, 493.

4. *Limitation applicable. Claims for board and services.*

The statute of limitation of three years bars any claim against the estate of a decedent, that accrued three years prior to the date of his death. *Loviza v. Lynch*, 694.

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LIMITATION OF ACTIONS—Continued.

5. *New contract. Correspondence.*

Where the purchaser of law books from a publishing company neglected to execute the installment notes therefor and some time thereafter wrote the publishing company, suggested that it make the purchase notes payable in installments of five dollars and ten dollars which was an alteration of the original agreement, and the publishing company accepted this proposition, this correspondence between the parties constituted a new written contract made and accepted by both parties, and the six year statute of limitations must be applied to such last contract. *Edward Thompson Co. v. Foy*, 848.

6. *Municipal corporations. Constitutional provisions.*

Under section 104, of our Constitution, so providing, the statute of limitations does not run against municipal corporations and this is true although the suit be by a town against a county. *Town of Crenshaw v. Panola County*, 891.

LOGS AND LOGGING.

1. *Liens for labor. Statute.*

Under chapter 131, Laws 1908, employees of a sawmill have concurrent liens on their employer's lumber, which may be enforced as to all of them in one suit in chancery. *Cooley v. Tullas*, 268.

2. *Trespass in logging. Right to damages.*

Where under a warranty deed to standing timber the only rights conveyed were those of ingress and egress to cut down and remove timber, the purchaser had no right to enter the land to box the trees for turpentine production or to set out fire thereon; but the right of the purchaser was limited to the privilege of going upon the land for the purpose only of cutting down and removing the timber thereon. *Rodgers v. Lumber Mineral Co.*, 339.

MANSLAUGHTER.

See HOMICIDE.

MARRIAGE.

1. *Capacity to marry. Prior marriage.*

A man already married and not divorced cannot marry another and a purported marriage between them was void, even without divorce. *Clark v. Clark*, 726.

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MARRIAGE—Continued.

2. *Same.*

In such case the second wife could legally marry another without obtaining a divorce from such pretended husband. *Clark v. Clark*, 726.

MASTER AND SERVANT.

1. *Injury to servant. Contributory negligence.*

The fact that a minor employee was watching a boiler, which was in danger of exploding, while he was guiding a log against a saw which injured his hand, was not contributory negligence on his part. *Walker Bros. v. Nix*, 199.

2. *Injury to servant. Negligence.*

A saw mill owner was negligent in failing to furnish an employee a safe place to work, where the mill operated a boiler which momentarily threatened to explode, in close proximity to such employee while employed in guiding logs against a running saw. *Ib.*

See NEGLIGENCE.

MECHANICS LIENS.

1. *Liens of materialmen and laborers. Rights of assignee of contractor.*

Under Code 1906, section 3074, giving to subcontractors materialmen and laborers, a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against sub-contractors, materialmen and laborers, serving notice after the assignment, though the assignee does not give the lien claimant notice of his assignment. *Strickland Lumber Co. v. Rheinhart*, 749.

2. *Materialmen. Rights of assignee of contractor. Partnership. Evidence. Admissibility.*

In a suit by a materialman to enforce his lien upon money paid into court by the owner as still due the principal contractor, where it was charged that the assignee of the principal contractor, was in fact in partnership with him it was error to exclude the evidence of partnership since if it was a partnership the purported assignee would be subordinated to all of the other claims for material and labor, though the notice of such other claimants were served after the assignment. *Ib.*

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MISTAKE.

Reformation of instruments. Voluntary conveyances.

Complainant, a voluntary grantee of his deceased mother, had the right to have the deed reformed as against his brother, also a voluntary grantee from his mother, where it clearly appears that through mistake the deed failed to carry out the intention of the donor. *Spencer v. Spencer*, 71.

See RECORDS.

MORTGAGES.

1. *Chattel. Conversion of mortgaged property by mortgagor's landlord.*

Where a landlord having waived his lien except as to rent on the tenant's share of the crop, in favor of a deed of trust given by the tenant to a supply merchant, sold the cotton, raised on the rented premises, in his own name and after deducting moneys due him, paid the balance to the tenant knowing of the merchant's trust deed. In such case the landlord should have turned the money over to the merchant after deducting his land rent and his failure to do so was a conversion of the cotton for which he was liable to the merchant mortgagee. *Evans v. Carpenter*, 572.

2. *Foreclosure sale. Surplus. Recovery.*

Where a bill was filed by a husband and wife charging that they executed a trust deed to secure a debt to defendant who on foreclosure, bid in the property for an amount greater than the debt, and that the sale was made subject to a prior deed of trust of an association and asking judgment for the surplus, and the defendant answered that he bid in the property under an arrangement by which he was to bid for them and take up the debt to the association, and there was evidence, that the trustee make the sale under the understanding as contended by the defendant and that a contract was signed by defendant and the husband pursuant to such arrangement and there was also evidence that the husband arranged with defendant to buy the property for him and that there was no such understanding until after the sale, and there was no evidence conveying knowledge of this arrangement to the wife except that the husband usually attended to the wife's business. In such case judgment for the wife for one-half of the surplus was erroneous, the chancellor either should have set aside the sale to defendant as being made under a mistake of fact or else should have held defendant to his bid and allowed both the husband and wife to recover the difference, and charged them with the rent between the time of sale and judgment and given defendant possession of the property by decree. *Browne v. Sanders*, 757.

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MORTGAGES.

MORTGAGES—Continued.

3. *Mistake of recorder. Effect. "Appears on face of record." "Appears by the record."*

Under Code 1906, section 2796, providing that where the remedy to enforce any deed of trust, etc., "appears on the face of the record" to be barred by the statute of limitations, the lien shall cease as to creditors and subsequent purchasers for a valuable consideration without notice unless within six months after such remedy is barred, the fact that such deed, etc., has been renewed or extended is duly filed for record. The fact that the clerk, in recording a trust deed, described the maturity of the note as January, 1904, instead of its true date January, 1905, would not bind the beneficiary where it discharged its duty by filing the trust deed for record, there being no difference between the phrase "appears on the face of the record" and the phrase "appears by the record." *Bank of Lexington v. Cooper*, 782.

4. *Priorities. Recording. Patent ambiguity.*

Where the record of a trust deed recited the maturity of the note secured thereby as January 1, 1904, and the trust deed as dated April 14, 1904, which described the note as bearing even date therewith, a patent ambiguity was disclosed which put the holder of a subsequent trust deed upon notice, since a promissory note of date April 14, 1904, could not possibly be made to mature at the earlier date of January 1, 1904. *Ib.*

5. *Priorities. Recording. Patent defects.*

Where the renewal trust deed correctly described the true maturity of the new note, the fact that the scrivner by mistake dated the deed 1911 instead of 1910 would not bind the beneficiary in favor of the holder of a subsequent deed of trust, where the acknowledgment bore date of 1910 and the instrument was filed for record in 1910, thus making the mistake patent upon the face of the record. *Ib.*

6. *Defective record. Secondary liens. Creditors. Subsequent purchaser.*

Where plaintiff had a live lien unaffected by any mistake of the clerk in recording, when the first trust deed to defendant was made and the original consideration by defendant was carried forward into a renewal trust deed, this remained a secondary lien within the principle that defendant was not a "creditor or subsequent purchaser" within Code 1906, section 2796, providing that a lien shall cease as to creditors and subsequent purchasers if a trust deed, etc., appears from the record to be barred. *Ib.*

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MUNICIPAL CORPORATIONS—NAMES.

MORTGAGES—Continued.

7. *Notice. Possession.*

Mortgagees to whom a grantee in a deed, gave trust deeds subsequent to the grantor's death, have no notice of plaintiff's claim except that plaintiffs were in possession of the land as wife and children of deceased, were bona-fide incumbrancers for value without notice of plaintiff's claim. *Jones v. Grimes*, 874.

MUNICIPAL CORPORATIONS.

1. *Paving county property. Liability. Statute.*

Under Laws 1912, chapter 260, section 4, relating to paving, a municipal corporation has no legal right to impose liability upon a county or the court house property of the county for paving the street in front of it as the act in question gives no such authority in law. *City of Grenada v. Grenada County*, 831.

2. *Paving. Manner of collecting assessments.*

Taking sections 23 and 25, Acts 1912, chapter 260, and reading them together, the court construed them to mean, that where the paving improvement had been made by the city, in a regular and lawful manner, and the property-owner in front of whose property the improvement had been made refused to pay for same, suit may be filed in the chancery court to enforce the lien against the property, and in that manner collect the amount expended by the city for the improvement. But under section 25 of the act it is provided that no personal judgment shall be rendered against the property-owner, but that the extent of the judgment shall only be to condemn and sell the property improved for the purpose of paying the tax assessed against it. *Ib.*

3. *Limitation of actions. Constitutional provisions.*

Under section 104, of our Constitution, so providing, the statute of limitations does not run against municipal corporations and this is true although the suit be by a town against a county. *Town of Crenshaw v. Panola County*, 891.

See HIGHWAYS.

NAMES.

Idem sonans.

The words "bowles" and "bowels" are not *idem sonans;* the first being a word of one syllable and the second a word of two syllables. The different positions of the letter "l" in the two words make two entirely different words. *May v. State*, 708.

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NEGLIGENCE.

1. *Carriers. Loss of live stock. Evidence. Sufficiency.*

Where in an action by a shipper against a common carrier for damages to live stock resulting from alleged negligence in handling them, the evidence showed that the animals were not physically injured, but were in apparently good condition when delivered to the consignee; that in the stockyards from which the stock were shipped there had been a short time before they were placed there, a contagious disease similar to the disease contracted by the animals in question; that live stock shipped from the North to South in that season frequently suffered from shipping cold and that several days after plaintiff received them, several animals developed colds, followed by pneumonia and died, but there was no evidence that this condition resulted from the negligence of defendant, in such case a verdict for plaintiff was erroneous and the court should have given a peremptory instruction for defendant. *Illinois Cent. Ry. Co. v. Ainsworth*, 20.

2. *Master and Servant. Injury to servant. Contributory negligence.*

The fact that a minor employee was watching a boiler, which was in danger of exploding, while he was guiding a log against a saw which injured his hand, was not contributory negligence on his part. *Walker Bros. v. Nix*, 199.

3. *Master and servant. Injury to servant.*

A saw mill owner was negligent in failing to furnish an employee a safe place to work, where the mill operated a boiler which momentarily threatened to explode, in close proximity to such employee while employed in guiding logs against a running saw. *Ib.*

4. *Master and servant. Evidence of want of skill. Statute.*

Laws 1912, chapter 215, providing that in all actions against railroads proof that the injury was inflicted by the running of an engine or cars shall be *prima-facie* evidence of want of skill and care, being but a rule of evidence, is applicable to a case brought under the Federal Employers' Liability Act (Act April 23, 1908, ch. 149, 35 Stat. 65, U. S. Comp. St. 1916, sections 8657-8655) since in all matters of precedure the *lex fori* governs. *N. O. & N. E. R. Co. v. Scarlet*, 285.

5. *Master and servant. Injuries to servant. Evidence.*

Under section 1985, Code 1906, making injury by a running train *prima-facie* evidence of negligence on the part of the railroad company, where the whole evidence in the case shows conclusively that the injury was inflicted by the running of the cars, the burden is upon the railroad to explain the injury and

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show how it occurred and failing to do this the court should give a peremptory instruction to find for the plaintiff. *Y. & M. V. R. R. Co. v. Mullins*, 343.

6. *Municipal corporations. Streets. Duties of automobile drivers.*

It is negligence for the driver of an automobile not to look in both directions when passing a street crossing. *Ulmer v. Pistole*, 485.

7. *Municipal corporations. Streets. Speed of travel.*

The driving of an automobile at an unlawful and dangerous rate of speed, upon a frequently used street in a populous part of a city, is negligence *per se*. *Ib.*

8. *Municipal corporations. Streets. Speed of travel.*

The operator of an automobile is entitled to the reasonable use and enjoyment of the street and highways so long as he operates his car in a careful and lawful manner, but the negligent and reckless operator who drives his car at a dangerous or unlawful rate of speed in disregard of the rights and safety of others should be held to strict accountability both civilly and criminally for his wrongful conduct. *Ib.*

9. *Municipal corporations. Street. Speed of travel.*

The same general law applicable to the use of all vehicles on public highways applies to automobiles, the substance of which is that a driver must use that degree of care and caution which an ordinarily prudent person would exercise under the same circumstances. *Ib.*

10. *Same.*

The driver of an automobile must keep his machine constantly under control; he must continue on the alert for pedestrians and others using the streets, and must anticipate their presence; especially must he expect and look out for vehicles and persons at such places as street intersections and corners, shopping centers, and other familiar places by and through which the main currents of the population habitually pass. It is his duty to slow down at street intersections in order that possible accidents and collisions may be foreseen and averted. *Ib.*

11. *Master and servant. Action for injury. Question for jury. Negligence and contributory negligence. Instructions.*

Where a carpenter working under the control and direction of a foreman, repairing bridges for defendant railroad company was returning from his work as usual on a motor car run by his foreman and while the motor car was running at a speed

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of some thirty-five miles an hour some one on the car gave the alarm that the car was approaching an open switch whereupon plaintiff and two others jumped off the car and was badly injured. In such case whether or not the motor car was being run at an excessive and negligent rate of speed under the circumstances, and if so, did the plaintiff have reason to believe and did believe that he was in great danger when he jumped from the car were questions which should have been submitted to the jury and a peremptory instruction for defendant should not have been given even though the motor car in fact entered the open switch safely. *Armstrong v. Gulf & S. I. R. Co.*, 698.

NEW TRIAL.

Jury. Impeachment of verdict.

Notwithstanding the facts that now nine jurors are permitted to render a verdict in a civil case, this does not change the rule that a juror is not allowed to impeach the verdict of the jury, since the verdict is still the verdict of the whole jury though it takes only nine jurors to arrive thereat. *Mobile & Ohio R. Co. v. Farrior*, 96.

NOTICE.

1. *Violation of liquor laws. Transportation. Presumption of knowledge.*

   The fact that an automobile is used by a passenger for the unlawful transportation of intoxicating liquors makes out a *prima-facie* case of the guilty knowledge of the owner of the vehicle, which may however be rebutted by proven facts in the case. *Aldinger v. State*, 314.

2. *Mortgagees or bona-fide purchaser. Notice of claim of vendor. Possession.*

   The exception to the general rule that possession of the land with claim of interest by the grantor is not, after the recording of a deed executed by him, notice to an innocent purchaser for value from his grantee of his claim or interest therein, is not subject to the qualification that where the possession of the grantor is long continued, a purchaser or mortgagee is put upon notice. *Jones v. Grimes*, 874.

3. *Mortgagee as bona-fide purchaser. Possession by wife after husband's death.*

   Even though it be conceded that the rule that possession of the grantor, after deed by him has been recorded is not notice of

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NOTICE—Continued.

claim by him, is not applicable because the trust deeds sought to be cancelled were executed by the grantee after the grantor's death, and while the plaintiffs, the wife and children of deceased, were in possession, this will not avail plaintiff, where the wife joined in the deed by the husband, and the bill avers no change in possession of the land after her husband's death, such as would arrest attention and excite inquiry, but simply that the wife has continued in the use and possession of the property ever since. *Ib.*

4. *Mortgagees. Possession.*

Mortgagees to whom a grantee in a deed, gave trust deeds subsequent to the grantor's death, having no notice of plaintiff's claim except that plaintiffs were in possession of the land as wife and children of deceased, were bona-fide incumbrancers for value without notice of plaintiff's claim. *Ib.*

See FORFEITURE; RECORDS.

PARTIES.

1. *Equity. Dismissal at final hearing. Lack of parties.*

Where in a bill to apportion alluvion, the claimants to a part of it are not made parties, the court on appeal will dismiss the bill without prejudice. *Stricker v. Codifer*, 305.

2. *Executors and administrators. Sale of realty. Parties interested. Annuitants. Contingent remaindermen.*

Under Code 1906, section 2079, providing that on petition to sell lands to pay debt of a decedent all parties interested shall be cited, and section 2056, charging lands of a decedent with the payment of his debts if the personalty is sufficient and section 2075 providing for a sale of realty in preference to personalty in certain instances, where a testator devised a residue of his property in trust to pay a certain sum out of the rents and profits to his son and his wife for life, without anticipation or liability for their debts, and provided that on the death of the survivor the trust should terminate and the property should vest in their children and the descendants of their children, and on the death of the son without children, in testator's right heirs, and gave the trustees powers to manage and sell. In such case on the petition of the executor for a sale of the realty, since the *cestui qui trust* were represented by the trustee neither they nor the contingent remainderman were owner or "parties interested," entitled to summons under the statute. *Brickell v. Lightcap*, 417.

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PARTNERSHIP.

1. *Denial. Verification of pleadings.*

Under section 1975, Code 1906, so providing, plaintiff need not prove the partnership of defendants, where their plea denying it was not sworn to. *Walker Bros. v. Nix*, 199.

2. *Corporations. Failure to report organization.. Liability as partners. Statute.*

Notwithstanding a corporation on account of its defective organization in failing to report to the secretary of state in thirty days after its organization is only a *de facto* corporation and notwithstanding its right to do business as such is questionable only by the state in a direct proceeding, this does not relieve its stockholders from liability to its creditors under Code 1906, section 930, providing that should such report be not made within thirty days from the time of the organization, the charter granted shall be null and void and all persons doing business thereunder shall be deemed and held to be partners and liable as such. *Hessig-Ellis Drug Co. v. Wilkerson*, 668.

3. *Corporations. Failure to report organization. Liability of stockholders as partners. Statute. Doing business.*

Under Code 1906, section 930, providing that all persons doing business under the charter of a corporation whose organization is not reported to the secretary of state in thirty days after its organization, shall be deemed to be partners and held liable as such, the stockholders of such corporation including one who bought his stock after the company had lost its right to do business because of its failure to report the organization to the secretary of state are liable to creditors since all did the business of the corporation in contemplation of law as well as its officers and agents. *Ib.*

See ASSIGNMENTS.

PASSENGER STATIONS.

1. *Carriers. Passenger trains. Passenger depot. Code* 1906, *sec.* 4867.

Where the train upon which plaintiff took passage carried passengers and took on passengers at a point and time in question, it was a passenger train within the meaning of Section 4867, Code 1906, providing that every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival and one-half hour after the departure of passenger trains; and all reception rooms shall be made comfortable and properly heated. *Adams v. Y. & M. V. R. Co.*, 865.

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PASSENGER STATIONS—Continued.

2. *Carriers. Station. Duty of carrier.*

Where a station was a regularly established station and the railroad company had a waiting room for passengers and sold tickets, checked baggage, etc., at that point and trains stopped there for passengers on flag and frequently without flagging, plaintiff, an intending passenger, had a right to rely thereon. *Ib.*

3. *Carriers. Care of station.*

Since under Code 1906, section 4867, so providing, carriers are required to keep "all passenger stations" open and comfortably heated for intending passengers, a regularly established station did not cease to be such within the meaning of the statute because some of its trains only stopped on flag, and the company having invited the public to take passage at that point, it was its duty to keep its waiting rooms open and comfortably heated for passengers about to take its trains. *Ib.*

PAVING.

See MUNICIPAL CORPORATIONS.

PLEADING.

1. *Corporations. Stockholder's action against directors. Sufficiency of bill. Right to sue.*

A bill by the stockholders of a bank against the directors for the book value of the stock is not demurrable where it alleges that the directors, by their misconduct, rendered the stock valueless, that the receiver had declined to bring the suit and showed that he was not a necessary party for which reason he was not joined in the suit, as a party defendant. *Kelly v. Applewhite*, 5.

2. *Attachment. Variance.*

On the trial of an action of attachment, the plaintiff in order to succeed must sustain his alleged ground of attachment, and it will not help him to prove other grounds of attachment not alleged in his affidavit for attachment. *Terry v. Jolly*, 26.

3. *Libel and slander. Charging special damages.*

A circular letter by an insurance company addressed to its agents only and not libelous *per se* is a qualified privilege communication and a declaration thereon for libel and slander was insufficient where it does not specifically state that any particular persons, other than defendant's agents, ever saw or heard of the circular and did not allege except in a general way wherein plaintiff was injured in business or reputation. *Holliday v. Maryland Casualty Co.*, 56.

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PLEADING.

PLEADING—Continued.

4. *Constitutional law. Class legislation. Sufficiency.*

A bill for an injunction against the issuance of bonds for a consolidated school district is insufficient to present the question whether the order creating the consolidated school was invalid because it did not provide for the maintenance of a colored school, where it did not allege, first, that there was sufficient colored children to maintain a public school and, second, where it did not allege that there was no colored school located in the territory comprising the district whereat the colored children may be educated in the same subjects taught in the consolidated school. *Trustees of Walton School v. Board of Supervisors of Covington County*, 117.

5. *Partnership. Denial. Verification of pleadings.*

Under section 1975, Code 1906, so providing, plaintiff need not prove the partnership of defendants, where their plea denying it was not sworn to. *Walker Bros. v. Nix*, 199.

6. *Quo warranto. Admissions. Demurrer.*

A demurrer to an information in a *quo warranto* proceedings admits all the allegations contained in the information and it is the duty of the supreme court on appeal in reversing the case, to assume that the allegations are true as stated. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

7. *Limitation of actions.*

The statute of limitations cannot be interposed by a demurrer but must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it. *Y. & M. V. R. Co. v. McGee-Dean Co.*, 282.

8. *Landlord and tenant. Actions. Sufficiency.*

A plea to an action for the balance of rent due under a lease, that the lease was void because the lease was entered into in contemplation of the premises being used for the unlawful sale of intoxicating liquors, sets up a good defense. *Lavecchia v. Tillman*, 288.

9. *Garnishment. Answer. Sufficiency. Statute.*

Under our statute on garnishments, it is the duty of the garnishee to expressly admit or deny any indebtedness to the defendant in attachment or execution as the case may be, and upon his failure so to do the plaintiff is entitled to a judgment by default unless the answer contains sufficient matter to entitle the garnishee to amend, in which event the plaintiff must except

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PLEADING.

PLEADING—Continued.

thereto, and if the exception should be sustained by the court, leave should be given to the garnishee to answer over, and upon his failure so to do judgment should be rendered against him by default for want of a sufficient answer. *Mechanics & Traders Ins. Co. v. Butler*, 476.

10. *Garnishment. Answer. Judgment.*

Under our garnishment statute, an answer of garnishees admitting an indebtedness due the defendant and alleging that it was subject to certain attachments was too vague and indefinite to raise an issue relative thereto, so that plaintiff was entitled to judgment on the answer for the amounts admitted to be due. *Ib.*

11. *Statute of limitations. New cause of action. Action for death. Computation of period. Amendments.*

Where a wife, as administratrix of the estate of her deceased husband brought suit for his death within the two years allowed under the federal employer's liability act, and her declaration, though stating a cause of action under the state laws, did not bring her cause under the operation of the federal act, an amendment of the declaration to bring the case within the federal employer's liability act (Act Cong., April 22, 1908, C. 149, 35 Stat. U. S. Comp. St. 1916, sections 8657-8665), by alleging that the injury resulting in the death of plaintiff's intestate occurred while the parties were engaged in interstate commerce, instead of intrastate commerce, did not constitute a new cause of action, barring the suit under the limitations of two years and such amendment was properly allowed. *Broom v. So. Ry. in Miss.*, 493.

12. *Eminent domain. Injuries to abutting property. Doubling street car track. Declaration.*

The declaration by property-owners for damages caused by doubling a street car track, which is set out herein was held by the court to state a good cause of action. *Hall v. Meridian Light & Ry. Co.*, 760.

13. *Cancellation of instruments. Bona fide incumbrancers. Demurrer.*

The *bona-fide* purchaser or incumbrancer for value defense is an affirmative one, and must be raised by plea or answer unless al the facts necessary to establish it are alleged in the bill, in which event it can be raised by demurrer. *Jones v. Grimes*, 874.

14. *Same.*

Where a bill by the widow and children of a deceased grantor to cancel his deed, and trust deeds given by the grantee, alleged that after the death of the grantor the grantee executed certain

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PLEADING—Continued.

trust deeds to defendants to secure loans for stated amounts, and that during such time plaintiff continued in possession, thus negativing knowledge or notice of plaintiff's claim on the part of defendant mortgagees, except such as would be implied from plaintiff's possession. In such case defendants could take advantage of their claims, as *bona-fide* incumbrancers for value, by demurrer. *Jones v. Grimes*, 874.

See ACCOUNT; DAMAGES.

POSSESSION.

See NOTICE.

PRACTICE.

See TRIAL.

PRESCRIPTION.

See ADJOINING LAND OWNERS.

PRESUMPTION.

See EVIDENCE.

PRINCIPAL AND AGENT.

Relation. Contract of hiring.

Under the facts as set out in its opinion, the court held that the evidence was not sufficient to show that one employed by a mill to get logs out of the woods, had any authority real or apparent to make contracts of hiring with cutters or to change or modify contracts. *Brookhaven Lumber & Mfg. Co. v. Posey*, 854.

PRINCIPAL AND SURETY.

1. *Guardian and ward. Loss of money by guardian. Liability of surety.*

Under Laws 1914, chapter 201, providing that when the chancellor designates the person to whom the money of the ward shall be loaned and the loan is so made, responsibility shall not thereafter attach to the guardian, where pursuant to an order of the chancellor permitting the guardian to place a sum of money in a named bank or other safe bank and providing that the "court does not relieve" the guardian or his bondsmen the guardian deposited the money of his ward in the named bank. In such case his sureties on his bond were not liable for loss of the ward's money due to the failure of the bank, the court having no power to add to their liability under the statute without their consent. *Cohn v. Winslow*, 275.

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PRINCIPAL AND SURETY—Continued.

2. *Release of sureties. Alteration of instruments.*

Where a promissory note with a surety, executed for two hundred and twenty dollars, twenty dollars of which being for illegal interest, was changed by the principals with the consent of the payee to two hundred dollars without the knowledge of the surety, in such case the surety was released but the principals were still bound. *Runnels v. James*, 607.

PROCESS.

1. *Judgment. Process to support. Publication. Personal judgment.*

No personal judgment can be entered against a foreign corporation by publication of process only. *Columbia Star Milling Co. v. Brand*, 625.

2. *Corporations. Service of foreign corporation. Immediate mailing of registered copy. Statute.*

Where in a suit against a foreign corporation, service of process on an agent of the corporation was made on September 6, 1915, but a copy of the process was not mailed to the corporation by registered letter at its home office until December 30, 1915, the summons calling for the appearance of the corporation in court at rules September 13th, there was no compliance with Code 1906, section 920, providing that it shall be the duty of the clerk immediately to mail a copy of the process to the home office of the corporation by registered letter. *Ib.*

3. *Same.*

In such case the summons was *functus officio*, its return day having passed, the statute was not complied with, in that the copy was not immediately mailed and this is a necessary part of the service of summons in order to bring a defendant in court. *Ib.*

PUBLICATION.

See PROCESS.

QUO WARRANTO.

1. *Grounds. Exercise of corporate franchise and powers.*

Under section 4017, Code 1906, *quo warranto* was the correct procedure for the attorney-general of the state to pursue, where a corporation practiced fraud in obtaining its charter and the acts of the alleged corporation under its charter have all been in violation of law. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

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QUO WARRANTO—Continued.

2. *Admissions. Demurrer.*

A demurrer to an information in a *quo warranto* proceedings admits all the allegations contained in the information and it is the duty of the supreme court on appeal in reversing the case, to assume that the allegations are true as stated. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

RAILROADS.

Injunction. Order of railroad commission. Establishment of station.

Where a railroad company objects to the reasonableness of the orders of the railroad commission, in requiring the erection of a new depot, injunction is the proper remedy, since in such case the commission in making such order was acting in its legislative or administrative capacity and not in a judicial or *quasi* judicial capacity. *Miss. R. R. Comm. v. Mobile & O. R. Co.*, 101.

See CARRIERS.

RAILROAD COMMISSION.

Action attacking railroad commission's order. Burden of proof.

Under Code 1906, section 4836, so providing, the order of the railroad commission establishing a depot was *prima-facie* correct and proper and one who attacks such order has the burden of proving its unreasonableness by "clear and satisfactory evidence." *Miss. R. R. Comm. v. Mobile & O. R. Co.*, 101.

RECORDS.

1. *Mortgages. Mistake of recorder. Effect. "Appears on face of record." "Appears by the record."*

Under Code 1906, section 2796, providing that where the remedy to enforce any deed of trust, etc., "Appears on the face of the record" to be barred by the statute of limitations, the lien shall cease as to creditors and subsequent purchasers for a valuable consideration without notice unless within six months after such remedy is barred, the fact that such deed, etc., has been renewed or extended is duly filed for record. The fact that the clerk, in recording a trust deed, described the maturity of the note as January, 1904, instead of its true date January, 1905, would not bind the beneficiary where it discharged its duty by filing the trust deed for record, there being no difference between the phrase "appears on the face of the record" and the phrase "appears by the record." *Bank of Lexington v. Cooper*, 782.

2. *Mortgages. Priorities. Recording. Patent ambiguity.*

Where the record of a trust deed recited the maturity of the note secured thereby as January 1, 1904, and the trust deed as

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REFORMATION OF INSTRUMENTS.

RECORDS—Continued.

dated April 14, 1904, which described the note as bearing even date therewith, a patent ambiguity was disclosed which put the holder of a subsequent trust deed upon notice, since a promissory note of date April 14, 1904, could not possibly be made to mature at the earlier date of January 1, 1904. *Ib.*

3. *Mortgages. Priorities. Recording. Patent defects.*

Where the renewal trust deed correctly described the true maturity of the new note, the fact that the scrivner by mistake dated the deed 1911 instead of 1910 would not bind the beneficiary in favor of the holder of a subsequent deed of trust, where the acknowledgment bore date of 1910 and the instrument was filed for record in 1910, thus making the mistake patent upon the face of the record. *Ib.*

4. *Mortgages. Defective record. Secondary liens. Creditors. Subsequent purchaser.*

Where plaintiff had a live lien unaffected by any mistake of the clerk in recording, when the first trust deed to defendant was made and the original consideration by defendant was carried forward into a renewal trust deed, this remained a secondary lien within the principle that defendant was not a "creditor or subsequent purchaser" within Code 1906, section 2796, providing that a lien shall cease as to creditors and subsequent purcasers if a trust deed, etc., appears from the record to be barred. *Ib.*

5. *Mortgagees or bona-fide purchaser. Notice of claim of vendor. Possession.*

The exception to the general rule that possession of the land with claim of interest by the grantor is not, after the recording of a deed executed by him, notice to an innocent purchaser for value from his grantee of his claim or interest therein, is not subject to the qualification that where the possession of the grantor is long continued, a purchaser or mortgagee is put upon notice. *Jones v. Grimes*, 874.

REFORMATION OF INSTRUMENTS.

1. *Voluntary conveyance.*

The general rule that voluntary conveyances being without consideration gives the grantee no right to reform without the consent of all parties, applies only in cases between the donor and donee. *Spencer v. Spencer*, 71.

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REFORMATION OF INSTRUMENTS—Continued.

2. *Same.*

This rule does not apply to conveyances in execution of a family settlement. *Spencer v. Spencer*, 71.

3. *Same.*

Complainant, a voluntary grantee of his deceased mother, had the right to have the deed reformed as against his brother, also a voluntary grantee from his mother, where it clearly appears that through mistake the deed failed to carry out the intention of the donor. *Ib.*

REPLEVIN.

1. *Executors and administrators. Right to possession of property against claim of third party. Protection of creditors. Statute.*

Under Code 1906, section 4784, commonly known as our "sign statute," an administratrix could maintain replevin for a stock of furniture held by deceased, who conducted the business of a trader in his own name, although another person had actually furnished the money for purchasing the stock, since presumptively the administratrix had the right of possession until all the creditors of deceased were paid, and it was immaterial that no actual debts against the estate were shown, where the time allowed creditors to probate accounts had not expired. *Hunter v. Forrest*, 7.

2. *Same.*

In such case, where the property had been purchased by the defendant in the name of the deceased at the time of the bankruptcy of defendant's husband, and the husband had turned over his exemptions to deceased, and there was no distinction between this property and that purchased by the wife in deceased's name, and since the creditors could have proceeded against the stock during deceased's life, their rights must be protected, after his death. *Ib.*

3. *Trover and conversion. Custody of replevied property. Delivery to wrong person.*

Where one in whose custody the sheriff has left replevied property, fails to deliver the property on the sheriff's request to the defendant in replevin who had given a replevin bond, but turns the property over to the plaintiff in replevin, such person is liable to the defendant in replevin, for its conversion irrespective of the merits of the replevin suit, and notwithstanding plaintiff in the replevin suit claimed the property had been stolen and it was required for identification purposes. A judg-

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REPLEVIN—Continued.

ment in such case will not affect the rights of the parties in the original replevin suit. *Abasi Bros. v. Louisville & N. R. Co.*, 149.

4. *Equitable defenses. Subrogation.*

In an action of replevin by an administrator *Cum testamento annexo* for stock certificates pledged by a former executor and trustee to secure a note to defendant for money borrowed by the executor, even though such money was applied to the payment of the debts of the estate and even though the estate was bound therefor by subrogation to the defendant, this equitable defense of subrogation could not be pleaded in a court of law, as it was not of such a character as would in a court of equity transfer the legal title of the property to the defendant. *Luckett v. Brickell*, 456.

5. *Trover and conversion. Title. Custody of replevied property.*

Where a carrier in whose custody the sheriff left replevied property, failed to deliver it to the defendant in replevin, who gave bond for it but turned it over to the plaintiff in replevin and defendant thereupon sued in trover, tendering the issue of title, which was decided against him, the defendant in the trover suit was not liable, since the bond given by defendant in replevin did not confer title, but at most merely the right of temporary possession. *Abasi Bros. v. L. & N. R. Co.*, 803.

RES ADJUDICATA.

See JUDGMENTS.

SALES.

1. *Conditional sale. Priority. Judgments. General liens.*

Where a jitney car company was engaged in two separate and distinct lines of business; first, operating automobiles and taxicabs for the carriage of passengers for hire in a city and vicinity; and second, trading in automobile supplies, and acquired a jitney buss and used it in its business of operating automobiles for hire, such bus did not come within the provision of section 4784, Code 1906, making property used in the business liable to creditors if a "business sign" is not displayed and in such case the lien of a judgment creditor must be postponed to the lien of the seller of the bus who sold with a reservation of title. *Orr v. Jackson Jitney Co.*, 140.

2. *Passing of title.*

Where there was an unconditional sale of a carload of lumber, the title passed to the buyer, when the lumber was delivered to

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SALES—Continued.

the railroad for transportation to the consignee buyer. *Merchants & Mfgrs. Bank of Ellisville v. Toomer Lbr. Co.*, 647.

3. *Unconditional delivery to consignee. Bill of Lading.*

Where a carload of lumber was delivered to a railroad for shipment to the buyer thereof, and the bill of lading for the same named the buyer as consignee, in such case the bill of lading was *prima-facie* evidence of an unconditional delivery to the consignee. *Orr v. Jackson Jitney Co.*, 140.

4. *Passing of title. Delivery to carrier. Intention.*

Where goods are delivered by a vendor to a common carrier consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction. *Merchants & Mfg. Bank of Ellisville v. Toomer Lbr. Co.*

5. *Carriers. Transfer of bill of lading. Title.*

An assignment or transfer of the invoice or bill of sale of a carload of lumber by the consignor to a bank, together with the delivery of the bill of lading, vested in the bank whatever title the consignor had to such lumber, this assignment and delivery constituted a symbolical delivery of the carload of lumber. *Ib.*

6. *Retention of bill of lading and delivery to bank. Effect.*

The retention of a bill of lading covering a carload of lumber by the consignor and the delivery of it, together with an assignment of the invoice of the lumber to a bank, in the absence of any testimony as to an absolute sale of the property to the consignee, shows that the consignor did not intend to part with its title or right of *jus disponendi* over the carload of lumber by the consignment to the consignee of the lumber. *Ib.*

7. *Same.*

Where the bank upon becoming the purchaser of the carload of lumber, as above stated, inclosed the bill of lading, together with the invoices, to the consignee, expressly stating in its letter to the consignee that the invoice and bill of lading were the property of the bank, and must be returned at once or remitted to them direct, and at the terms at which the lumber was purchased, this notation by the bank was a notification to the consignee of its ownership of the property covered by the bill of lading and invoice, and the bank retained title to the carload of lumber until its terms were accepted and where there was no acceptance of the shipment by the consignee before the seizure of the lumber under an attachment, the banks claim-

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SALES—Continued.

ant's issue as against the attaching creditor of the consignee should be sustained. *Ib.*

8. *Frauds, statute of. Delivery to carrier.*

The delivery of goods to a common carrier consigned to the purchaser is a delivery to the purchaser of such goods. *Walker Bros. & Co. v. Daggett*, 657.

9. *Breach. Remedies.*

Where a part of a bill of goods verbally ordered was accepted and paid for by the purchaser, but before the balance of the goods were shipped, the purchaser notified the seller that he would not accept or pay for the balance of the goods, in such case the seller had the right to ship the goods and recover for the same and was not bound to sell the goods and sue for the difference between the price realized at such sale and the contract price. *Ib.*

SCHOOLS AND SCHOOL DISTRICTS.

1. *Constitutional law. Race legislation.*

Act 1910, chapter 124, as amended by Act 1912, chapter 255, in reference to consolidated schools, is not in conflict with the state or federal constitution, because under the law the board has the same power to create consolidated schools for the colored race that it has for the white race. *Trustees of Walton School v. Board of Supervisors of Covington County*, 117.

2. *Consolidated school districts.*

A consolidated school district is simply a common school district where two or more existing schools have been consolidated into one single school district. *Ib.*

3. *Issue of bonds. Submission to voters. Petition. Sufficiency.*

A petition signed by twenty per cent of the qualified voters of the district requesting submission to the voters for their rejection or approval of the question of issuing bonds for the purchase of building a consolidated school, was insufficient, such petition not being against the issuance of the bonds by twenty per cent of the voters as required by law. *Ib.*

4. *Bonds. Petition for submission to voters. Amendment.*

The board of supervisors was right in refusing to allow an amendment to a petition to submit to the voters, the question of issuing bonds for a consolidated school, after the first Monday in July and in the absence of the petitioners, since such petition could not be amended without the consent of the parties who

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SCHOOLS AND SCHOOL DISTRICTS—Continued.

signed it and where it did not appear that twenty per cent of the qualified electors and tax payers of the district consented to such amendment. *Trustees of Walton School v. Board of Sup'rs of Covington Co.*, 117.

SELF DEFENSE.

See HOMICIDE.

SHERIFFS.

Tax sale. Fee. Statute.

Under Code 1906, section 2197, subd. 1, cl. "E," allowing sheriffs a fee of twenty-five cents "for advertising and selling each separately described subdivision of land sold for taxes," the sheriff was entitled to receive this fee where he only advertised the land but made no sale, the taxes having been paid before such sale was made. *Darnell v. Smith*, 547.

SIGNATURES.

1. *Wills. Execution. Statutes.*

A will was properly executed under Code 1906, section 5078, where a testatrix went to a bank and procured a will she had previously executed from among her private papers, re-wrote it in her own handwriting, beginning: "I, Mrs. Mollie Herman of Warren County, Mississippi, of sound mind and memory make this my last will," but did not sign it at the end of the will, and sent for the two subscribing witnesses, who attested the document in her presence, at her request, and thereupon the old will was destroyed; such circumstances showing that the writing of testatrix's name in the body of the will was intended as her signature to the same. *Better v. Hirsch*, 614.

2. *Wills. Signature in body of will. Intention of testator.*

Whether the signature written in the body of a will in any case is the completed act or not, depends on the intention of the testator, and may be regarded as a question of fact to be answered and controlled by the testimony in each case. *Ib.*

3. *Contracts. Offer. Signing on typewriter.*

A letter constituting a contractual offer signed on a typewriter, is valid and binding on the signer, if he wrote it and signed it on the typewriter, or authorized that to be done. *Edward Thompson Co. v. Foy*, 848.

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STATUTES.

Constitutional law. Wisdom of statute. Legislative question.

With the wisdom of a legislative act the courts have nothing to do, that is a matter entirely for the lawmaking body. It is solely the duty of the court to say whether or not the act as passed by the legislature is violative of any of the provisions of the state or feredal Constitutions. *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 254.

STATUTES CITED AND CONSTRUED.

Ch. 85 (1916). Counties. Limitation of taxation. Construction of statutes. *Y. & M. V. R. Co. v. Grenada County*, 238.

Ch. 103 (1916). Intoxicating liquors. Illegal possession. Evidence. Sufficiency. *Romano v. State*, 192.

Ch. 103, sec. 16 (1916). Intoxicating liquors. Transporting liquors. Forfeiture of vehicles. Statute. *Aldinger v. State*, 314.

Ch. 111, sec. 797 (1910). Appeal and error. Stenographer's notes. Order extending time. Validity, Statute. *Met. Cas. Ins. Co. of N. Y. v. Sullivan*, 399.

Ch. 124 (1910). Constitutional law. Schools and school districts. Race legislation. *Trustees of Walton School v. Board of Supervisors of Covington County*, 117.

Ch. 131 (1908). Logs and logging. Liens for labor. Statute. *Cooley v. Tullas*, 268.

Ch. 135, sec. 3 (1916). Commerce. Interstate commerce. Constitutional provisions. Constitutional law. Privileges and immunities. Counties. Contracts. Constitutional and statutory provisions. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 254.

Ch. 177 (1916). Highways. Taxation. Statute. *Martin v. Little*, 195.

Ch. 201 (1914). Guardian and ward. Loss of money by guardian. Liability of surety. *Cohn v. Winslow*, 275.

Ch. 215 (1912). Master and servant. Evidence of want of skill. Statute. *N. O. & N. E. R. Co. v. Scarlet*, 285.

Ch. 255 (1912). Constitutional law. Schools and school districts. Race legislation. *Trustees of Walton School v. Board of Supervisors of Covington County*, 117.

Ch. 269, sec. 4 (1912). Municipal corporations. Paving county property. Liability. Statute. *City of Grenada v. Grenada County*, 831.

See CODE CITED AND CONSTRUED.

STATUTES OF LIMITATION.

See RECORDS.

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STOPPAGE IN TRANSITU—TAXATION.

STOPPAGE IN TRANSITU.

Carriers.

In such case the doctrine of stoppage *in transitu* does not apply where the legal title to the lumber sold was in the bank. *Merchants & Mfgs. Bank of Ellisville v. Toomer Lbr. Co.*, 647.

STREET IMPROVEMENTS.

Municipal corporations. Paving. Manner of collecting assessments.

Taking sections 23 and 25, Acts 1912, chapter 260, and reading them together, the court construed them to mean, that where the paving improvement had been made by the city, in a regular and lawful manner, and the property-owner in front of whose property the improvement had been made refused to pay for same, suit may be filed in the chancery court to enforce the lien against the property, and in that manner collect the amount expended by the city for the improvement. But under section 25 of the act it is provided that no personal judgment shall be rendered against the property-owner, but that the extent of the judgment shall only be to condemn and sell the property improved for the purpose of paying the tax assessed against it. *City of Grenada v. Grenada County*, 831.

SUBROGATION.

See EQUITY.

TAXATION.

1. *Highways. Statute.*

Chapter 177, Laws 1916, authorizing highway taxation if a county board of supervisors should elect to proceed under it, is independent of the last 11 sections of the Code, chapter on "Roads, Ferries and Bridges," and is not limited by Code 1906, section 4469, limiting taxation to three mills on the dollar, since such limitation relates to another and entirely distinct method of highway taxation. *Martin v. Little*, 195.

2. *License. Trial. State revenue agent. Power to sue.*

Section 4738, Code 1906, empowering the state revenue agent to proceed by suit in the proper court for a past due and unpaid tax, was not designed to authorize the revenue agent to bring such an action in a court of equity and where such action is brought in the chancery court and that court decides to decline jurisdiction in such case section 162 of the Constitution providing that all cases that may be brought in chancery whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court, is mandatory and the chancery court should

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TAXATION.

TAXATION—Continued.

transfer the cause to the circuit court. *Robertson, Revenue Agent, v. F. Goodman Dry Goods Co.*, 210.

3. *Counties. Limitation of taxation. Construction of statutes.*

The limitation provided by chapter 85, Laws 1916, on the amount of taxes that boards of supervisors may levy, does not include taxes levied in order to raise revenue with which to discharge debts incurred by such boards under section 331 and 334, Code 1906, since by the general language there used, the legislature did not intend to withdraw from such boards the power to provide for the payment of debts which they had lawfully incurred. *Y. & M. V. R. Co. v. Grenada County*, 238.

4. *Highways Road tax. Liability for commutation.*

Under Code 1906, section 4442, declaring that if a public road be worked and kept up by contract the road hands designated by the board shall work under the contractor or pay commutation money to him; where the board of supervisors contracts for the working of roads, and designate and assign the road hands as required by this section and furnish to the contractor a correct and proper list of such road hands which is accepted by him, the work or commutation tax due by such hands "shall be estimated as a part of the whole of the contractor's renumeration according to the contract" and the contractor is chargeable with the work or commutation tax due by each road hand on the list, provided the board of supervisors had not by its own acts or conduct prevented the contractor from obtaining the work or collecting the commutation tax due from the hands; and provided, further, that the contractor could secure the work or collect the tax by reasonable effort and due diligence on his part, but where the contractor has performed his duty in good faith in the collection of the road duty or commutation tax, and has failed to make all of the collections on the list, then he would be entitled to credit for all the work or commutation tax that he failed to collect for any cause over which he had no control. *Thomason v. Board of Sup'rs. of Lawrence County*, 293.

5. *Same.*

The fact that the contractor accepts the list of hands and undertakes to collect the tax according to the list does not bind him for the full amount charged to him on the list unless he collects the same, or unless it appears that his failure to do so was his own fault or negligence. *Ib.*

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TAXATION—Continued.

6. *Clerks of courts. Compensation. Copy of tax assessments.*

Under Code 1906, section 2175, declaring that the board of supervisors may allow the clerk reasonable compensation for making copies of assessment rolls, not to exceed one cent for each separate assessment of lands per copy but the board may allow as much as fifty dollars in any case for copying the personal roll and under section 4384, requiring the state Railroads Commissioner to assess property of railroads, telegraph, telephones, sleeping car and express companies and section 4387, providing that in each year the commission shall make out for each county having any such property an assessment roll of such property therein and assess both real and personal property, and that the form of such assessment shall be transmitted to the clerk and under section 4390 requiring the clerk to make copies but making no provisions for compensation, the clerk's compensation is governed by section 2175, and in a suit by the board of supervisors against its clerk for over payments made him for such service, the board cannot recover unless it specifies in its declaration what companies were assessed in the county by the railroad commission and the number of such assessments and the amount that was properly allowed the clerk. *Board of Sup'rs. of Grenada County v. King*, 521.

7. *Assessments. State revenue agent. Commissions.*

Under Code 1906, section 4740, providing that after the fiscal year in which taxes become due, should the state revenue agent discover that any person, corporation, etc., has escaped taxation by not being assessed, he shall give notice to the tax collector who shall make the assessment and have the property back assessed, where the state revenue agent caused property to be placed on the assessment rolls of a county for the year 1913, this did not entitle him to commissions on the assessment for the year 1914, on the theory that he had discovered the omission of such property, where the sheriff himself placed such property on the assessment roll for the year 1914, even though the assessments were biennial, since the sheriff at any time during the fiscal year 1914 had full authority to back assess all property without reference to the revenue agent. *Johnson v. Board of Sup'rs. of Yazoo County*, 528.

8. *Same.*

The revenue agent does not come within the provision of the statute as to assessments for future years. *Ib.*

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TAXATION.

TAXATION—Continued.

9. *Sheriffs. Tax sale. Fee. Statute.*

Under Code 1906, section 2197, subd. 1, cl. "E," allowing sheriffs a fee of twenty-five cents "for advertising and selling each separately described subdivision of land sold for taxes," the sheriff was entitled to receive this fee where he only advertised the land but made no sale, the taxes having been paid before such sale was made. *Darnell v. Smith*, 547.

10. *Municipal corporations. Review of assessments. Time for appeal.*

A motion to dismiss an appeal from a municipal assessment because not filed within five days after the assessment, was properly overruled, where the appeal was filed within five days after the assessment roll was approved, since there could be no appeal until the roll was approved. *Gloster Compress & Trading Co. v. Mayor & Aldermen of Town of Gloster*, 578.

11. *Evidence. Value. Price at which property is offered for sale.*

On an appeal from a municipal assessment for taxes on a cotton compress and warehouse, it was competent for the owners to introduce evidence that they were willing to sell and had offered to sell it for a less price than the amount of the assessment, where there was evidence that such offer was not in the nature of a forced sale; but was a *bona-fide* offer by the owners and in their opinion was a just valuation of the property in view of prevailing conditions. *Ib.*

12. *Tax sales. Statute.*

Lands in different sections owned by the same party and only separated by a public road, should be assessed for taxes as a single tract. *Wilkerson v. Harrington*, 637.

13. *Same.*

Lands in different sections, though owned by the same party but located a material distance apart, and in no way connected nor used as a part of a single farm or plantation, should not be assessed for taxes as a single tract. *Ib.*

14. *Tax sales. Contiguous tracts.*

Under Code 1906, section 4328, providing for the sale of lands for delinquent taxes, lands lying in different sections, which corner on the section line and which are owned by the same party, should be assessed and sold as one tract; the fact of their cornering being sufficient to show that they were contiguous, the word "contiguous tract" meaning tracts in actual or close contact to, adjacent, or near. *Ib.*

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TAXATION—Continued.

15. *Equalization by board. Jurisdiction.*

When the board of supervisors is meeting for the equalization of taxes, it acts as a court of limited jurisdiction and all of the jurisdictional facts must appear upon the minutes of the board to render its proceedings valid. *Robertson v. First National Bank of Greenwood*, 840.

16. *Equalization. Notice to taxpayers.*

Under section 6, chapter 98, Laws 1916, it is incumbent on the president of the board of supervisors to give five days' notice "by posting, at the court house or publishing in a newspaper of the county" of the special meeting at which action is to be taken for the equalization of taxes and where such notice was not given the board of supervisors was without jurisdiction to raise the assessment of defendant bank at that meeting or at a later meeting, also without notice, and their orders and proceedings were absolutely void. *Ib.*

17. *Highways. Distribution by counties. Code* 1906, *sections* 4443-4469.

The statutory scheme, Code 1906, section 4443, relating to the levy of road taxes by a board of county supervisors and section 4469, relating to the road fund, contemplates that the board of supervisors shall supervise the distribution of the funds otherwise there would be no record thereof. *Town of Crenshaw v. Panola County*, 891.

18. *Highways. Road tax. Liability to town. Amount.*

Under section 4443, Code 1906, authorizing a county to levy a road tax on all the taxable property of the county and section 4469, providing for the distribution of the road fund, a county collecting a road tax on property within the corporate limits of a town and which had not spent any of the money on working the streets of the town must pay over to the town one half of the road taxes collected therein. *Ib.*

TAXES.

Highways. Validity.

A two-mill road tax is valid under section 4469, Code 1906, provided the roads of a county are being worked by contract in accordance with section 4465 of the Code, and until the contrary appears the court must presume that they were being so worked. *Y. & M. V. R. Co. v. Grenada County*, 238.

TAX SALES.

See TAXATON.

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TELEGRAPHS AND TELEPHONES.

1. *Failure to transmit message. Statutes.*

Under Laws 1908, chapters 76-78, penalizing telegraph companies for failure to deliver a message after it has been received at the place of delivery; where a telegram was telephoned by an employee of the telegraph company at an intermediate office to the residence of the sendee, using a telephone company with which the telegraph company had no contract and received by one who promised to deliver it to the sendee and was not afterwards telegraphed to the telegraph office of sendee's place of residence, in such case the telegram was not in fact sent over the telegraph company's wires to the sendee's place of residence, and the company was not liable under the statute for failure of its office to produce the telegram on the demand of the sendee. *Western Union Telegraph Co. v. Meek*, 82.

2. *Failure to deliver telegram. Exemplary damages.*

Where in a suit against a telegraph company the declaration alleged that the company wantonly and wilfully refused to deliver a telegram, exemplary damages were recoverable if the averments of the declaration were true, even though no actual damages were suffered. *Johnson v. Western Union Tel. Co.*, 884.

TRESPASS.

1. *Logs and logging. Trespass in logging. Right to damages.*

Where under a warranty deed to standing timber the only rights conveyed were those of ingress and egress to cut down and remove timber, the purchaser had no right to enter the land to box the trees for turpentine production or to set out fires thereon, but the right of the purchaser was limited to the privilege of going upon the land for the purpose only of cutting down and removing the timber thereon. *Rodgers v. Lumber Mineral Co.*, 339.

2. *Master and servant. Cutting timber. Liability.*

It is not sufficient for the purchaser of standing timber of certain dimensions only, to send out a bunch of laborers with general instructions to cut only the timber of the dimensions purchased; but it devolves upon him to exercise reasonable superintendence over the employees, to see that they cut the timber according to his contract and with due regard to the rights of the other party. *Bates v. Brevard-Woods Stave Co.*, 588.

TRIALS.

1. *Appeal and error. Exclusion of testimony. Matters not in record.*

The supreme court on appeal cannot review the exclusion by the court below of the testimony of a witness where, while the

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TRIALS—Continued.

record discloses the question sought to be propounded to the witness, it does not disclose what his answers thereto would have been so that the courts may judge of the materiality and relevancy thereof to the issue being tried, and if material, whether appellant was prejudice by the exclusion thereof. *N. O. & N. E. R. Co. v. Scarlet*, 285.

2. *Equity. Dismissal at final hearing. Lack of parties.*

Where in a bill to apportion alluvion, the claimants to a part of it are not made parties, the court on appeal will dismiss the bill without prejudice. *Stricker v. Codifer*, 305.

3. *Carriers. Notice of loss. Question for jury.*

Where under a bill of lading, making it a condition precedent to a recovery of damages for loss in shipment of stock, that the shipper give notice in writing of his claim to a general officer or the nearest local station agent, the shipper orally notified the station agent, who wrote out the claim, but the shipper himself was not quite positive that the written claim was made, though he testified, as his best recollection that it was reduced to writing, in such case it was a question for the jury as to whether the stipulation was complied with. *Pickle v. Receiver of St. L. & S. F. Ry. Co.*, 322.

4. *Insurance. Fraud. Question for jury.*

In a suit upon a life insurance policy, the question of fraud by the insured in making his application for insurance, was properly submitted to the jury, where there was a conflict in the testimony as to whether or not deceased knew of his malady at the time he applied for the insurance. *N. Y. Life Ins. Co. v. Montgomery*, 350.

5. *Garnishment. Answer. Sufficiency. Statute.*

Where the answer of the garnishee simply amounts to an allegation that he is unable to say whether or not he is indebted to the defendant, but that in the event he should afterwards ascertain that he is so indebted he will with the permission of the court, file an amended answer setting that fact forth. In such case the proper course for plaintiff to pursue with such answer is to except thereto, which exception should be sustained by the court and judgment for want of a sufficient answer awarded, unless the garnishee ask leave to amend, in which event he should be permitted so to do, and if dissatisfied with the amended answer plaintiff should then take issue upon the answer and the cause should then proceed to trial thereon. *Mechanics & Traders Ins. Co. v. Butler*, 476.

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TRIALS—Continued.

6. *Garnishment. Answers. Contest. Statute.*

In such case, the plaintiff lost the right to contest such answer, and obtain judgment for larger sums than those admitted to be due by the answer, where he did not contest the answer of the garnishee during the term at which it was filed, or obtain leave from the court to contest it, at a subsequent term, since under section 2353, Code, 1906, the garnishee's answer must be contested at the term at which it was filed or leave then obtained from the court to contest the same at a subsequent term. *Ib.*

7. *Jury. Drawing jury. Prejudice. Evidence. Sufficiency.*

Under the facts of this case the court held, that defendant was not prejudiced by the fact that the plaintiff's brother who was the clerk of the board of supervisors was present, and assisted in the drawing of the juries for the term. *Ulmer v. Pistole*, 485.

8. *Argument of counsel.*

The fact that the plaintiff's counsel in his closing argument to the jury spoke of defendants' instructions as "these little, old, trickey, catchy instructions given for the purpose of misleading an honest jury," while highly improper, was not reversible error. *Ib.*

9. *Municipal corporations. Taxation. Review of assessments. Time for appeal.*

A motion to dismiss an appeal from a municipal assessment because not filed within five days after the assessment, was properly overruled, where the appeal was filed within five days after the assessment roll was approved, since there could be no appeal until the roll was approved. *Gloster Compress & Trading Co. v. Mayor & Aldermen of Town of Gloster*, 578.

10. *Corporations. Appearance. Suggestion to court of attorney for individual defendant.*

In a suit against a foreign corporation and also its president who was its principal stockholder and active manager and who, in his individual answer, set up all the defenses he thought could have been set up by the corporation, such president's attorney of record, by his suggestion or argument to the court that the corporation was not properly in court; did not thereby enter an appearance for the corporation, since he clearly had the right to suggest that any proposed motion in the case should be overruled, either as attorney of one defendant or as *amicus curiae*. *Columbia Star Milling Co. v. Brand*, 625.

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TRIALS—Continued.

11. *Master and servant. Action for injury. Question for jury. Negligence and contributory negligence. Instructions.*

Where a carpenter working under the control and direction of a foreman, repairing bridges for defendant railroad company was returning from his work as usual on a motor car run by his foreman and while the motor car was running at a speed of some thirty-five miles an hour some one on the car gave the alarm that the car was approaching an open switch whereupon plaintiff and two others jumped off the car and was badly injured. In such case whether or not the motor car was being run at an excessive and negligent rate of speed under the circumstances, and if so, did the plaintiff have reason to believe and did believe that he was in great danger when he jumped from the car were questions which should have been submitted to the jury and a peremptory instruction for defendant should not have been given even though the motor car in fact entered the open switch safely. *Armstrong v. Gulf & S. I. R. Co.*, 698.

12. *Forgery. Indictment. Variance.*

Where there is a variance between the indictment and the proof, a motion by the defendant to exclude the testimony of the state should be sustained. *May v. State*, 708.

13. *Compromise and settlement. Question for jury. Construction.*

Where plaintiff sold goods on defendant's order and defendant refused to pay for same, and plaintiff sued but the attorneys for both parties reached an understanding resulting in a judgment of dismissal, and the parties afterwards disagreed as to the meaning of the settlement agreement and plaintiff brought a new action for the original amount, in such case it was a question for the jury as to what was the agreement and it was error to peremptorily instruct for the defendant, especially where defendant did not attempt to carry out the agreement for which it contended. *Michael Co. v. O'Connel-Myers Co.*, 720.

14. *Instructions. Preponderance of evidence.*

Where in a suit by a property owner for damages by fire alleged to have been caused by sparks from defendant's locomotives, the evidence would have warranted a finding for either party, it was error for the court to instruct the jury to find for the defendant, if the evidence left them in doubt and uncertain as to the cause of the fire, or whether the fire was caused by defendant's locomotive or some other person. *Mardis v. Y. & M. V. R. Co.*, 734.

See NEGLIGENCE; EVIDENCE; JUDGMENT.

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TROVER AND CONVERSION.

1. *Custody of replevied property. Delivery to wrong person.*

Where one in whose custody the sheriff has left replevied property, fails to deliver the property on the sheriff's request to the defendant in replevin who had given a replevin bond, but turns the property over to the plaintiff in replevin, such person is liable to the defendant in replevin, for its conversion irrespective of the merits of the replevin suit, and notwithstanding plaintiff in the replevin suit claimed the property had been stolen and it was required for identification purposes. A judgment in such case will not affect the rights of the parties in the original replevin suit. *Abasi Bros. v. Louisville & N. R. Co.*, 149.

2. *Title. Custody of replevied property.*

Where a carrier in whose custody the sheriff left replevied property, failed to deliver it to the defendant in replevin, who gave bond for it but turned it over to the plaintiff in replevin and defendant thereupon sued in trover, tendering the issue of title, which was decided against him, the defendant in the trover suit was not liable, since the bond given by defendant in replevin did not confer title, but at most merely the right of temporary possession. *Abasi Bros. v. Louisville & N. R. Co.*, 803.

3. *Taking of property. Evidence. Sufficiency.*

The court held that the evidence set out in the opinion was sufficient in this case to show that the plaintiff in replevin to whom one defendant gave the property for which the other defendant sued in trover, lost the property replevied through the act of some person without authority of law. *Ib.*

4. *Carriers. Delivery of property to stranger. Liability.*

If a shipper of property is not the real owner, the carrier may, upon demand, turn the property over to the true owner and defeat the shipper's claim or suit for failure to deliver by an affirmative showing that it had turned the goods over to the true owner. *Ib.*

5. *Carriers. Delivery of property to stranger. Liability.*

Presumptively the bailor or shipper is entitled to the property as against the carrier, and the bailee cannot himself hold the property by setting up title in a third person, but this rule has no application when the carrier yields to the paramount claim or title of the true owner. *Ib.*

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TROVER AND CONVERSION—Continued.

6. *Carrier. Action for failure to deliver. Burden of proof.*

To justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery. *Abasi Bros. v. Louisville & N. R. Co.*, 803.

See MORTGAGES.

TRUSTS.

1. *Wills. Construction. Distinguished from trust.*

A letter stating that the writer was holding property to protect the interest of the addressee and that he would later give her a deed to it and declaring that the land was for the addressee at the writer's death, is not a will but a declaration of trust. *Morgan v. Hayward*, 354.

2. *Testamentary trustee. Sale of land. Fraud. Presumption.*

The fact that a trustee, acting with the executor and another trustee in petitioning for a sale of realty to pay debts, had a probated account against the estate, was not sufficient to show fraud, since his good faith will be presumed. *Brickell v. Lightcap*, 417.

USURY.

1. *Excessive interest. Statute. Construction.*

Under Code 1906, section 2678, as amended by Laws 1912, chapter 229, providing that "if a greater rate of interest than eight per cent. shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory," a creditor is not penalized merely for demanding a greater rate of interest than eight per cent. where there was no contract to pay a greater rate and no such excessive interest was actually paid. *Doyle v. L. Herzog & Bros. Dry Goods Co.*, 154.

2. *Burden of proof.*

Where there was no contract to pay a greater rate of interest than eight per cent., the burden of proof is upon the debtor to show that he actually paid a greater rate. *Ib.*

VARIANCE.

See PLEADING; TRIALS.

VERDICT.

1. *New trial. Jury. Impeachment of verdict.*

Notwithstanding the facts that now nine jurors are permitted to render a verdict in a civil case, this does not change the rule

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VERDICT—Continued.

that a juror is not allowed to impeach the verdict of the jury, since the verdict is still the verdict of the whole jury though it takes only nine jurors to arrive thereat. *Mobile & O. R. Co. v. Farrior*, 96.

2. *Jury. Verdict of nine jurors. Validity. Conclusiveness.*

A verdict in a civil case returned by nine jurors is valid and constitutional and the verdict cannot be impeached by any one of the twelve jurors on the jury. *Ulmer v. Pistole*, 485.

3. *Damages. Excessive damages.*

A verdict of ten thousand dollars to a husband for the injury, pain, suffering and death of his wife caused by an automobile collision was not excessive. *Ib.*

4. *Homicide. Manslaughter. Sufficiency of evidence.*

Under the facts as set out in its opinion, the court held that the trial court should have set aside the verdict and granted defendant a new trial because the verdict was contrary to the overwhelming weight of the testimony. *McNeal v. State*, 678.

5. *Appeal and error. Scope of review. Conflicting evidence.*

Where there is a distinct conflict in the evidence which might well have been resolved either way, the verdict of a jury will not be disturbed on appeal, unless the jury were improperly instructed as to the law of the case. *Mardis v. Y. & M. V. R. Co.*, 734.

See DAMAGES.

VERIFICATION.

See PLEADING.

WAIVER.

See ESTOPPEL.

WATERS AND WATER COURSES.

1. *Surface water. Protection. Adjoining owner.*

When adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rain water in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. "One must so use his own as not to unnecessarily injure others." *Holman v. Richardson*, 169.

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WILLS.

WATERS AND WATER COURSES—Continued.

2. *Same.*

Where two methods of disposing of such water are available to the owner of the lower lot, each equally efficaceous and neither requiring an unreasonably greater expense than the other, one of which will damages adjoining property and the other will not, the latter must be adopted by the owner of the lower lot in finding the water therefrom. *Holman v. Richardson*, 169.

3. *Surface water. Right of owner of lower adjoining lot.*

The owner of a lower adjoining lot has no right to prevent surface water from crossing her lot in a diffused state by means of a brick wall, causing it to pond on a higher lot, where at no greater expense she can fully protect herself by digging a ditch across her lot to a public drain, and at the same time inflict no damage on the higher lot, though she has the right to maintain such brick wall if she takes reasonable care to prevent the water ponding on the higher lot. *Ib.*

4. *Prescription. Drainage. Knowledge of use.*

The owner of a high lot could not acquire a prescriptible right to collect surface water in underground drains and cast it over and across a lower lot through a ditch to a public drain, where such underground tile drains on the higher lot were unknown to the owner of the lower adjoining lot, and where their existence in the nature of things were not open and notorious. *Ib.*

5. *Surface water. Damages.*

Where an underground tile drain on a higher lot did not cause any more water to collect and flow through a ditch upon an adjoining lot, than would have done without such drain, the owner of the lower lot cannot complain of its existence. *Ib.*

WILLS.

1. *Construction. Distinguished from trust.*

A letter stating that the writer was holding property to protect the interest of the addressee and that he would later give her a deed to it and declaring that the land was for the addressee at the writer's death, is not a will but a declaration of trust. *Morgan v. Hayward*, 354.

2. *Same.*

In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance but the time at which by the terms of the instrument a prop-

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WILLS—Continued.

erty right under the instrument attaches. If by the terms of the instrument no property right is to attach under it until testator's death, the instrument is a will; but if a property right attaches during testator's lifetime, the instrument is a contract, even though the time of performance may be postponed till the death of the testator. *Ib.*

3. *Construction.*

In constructing a will the court should look to the general scope and purpose and the entire language employed. *Brickell v. Lightcap*, 417.

4. *Execution. Signature. Statutes.*

A will was properly executed under Code 1906, section 5078, where a testatrix went to a bank and procured a will she had previously executed from among her private papers, re-wrote it in her own handwriting, beginning: "I, Mrs. Mollie Herman of Warren County, Mississippi, of sound mind and memory make this my last will," but did not sign it at the end of the will, and sent for the two subscribing witnesses, who attested the document in her presence, at her request, and thereupon the old will was destroyed; such circumstances showing that the writing of testatrix's name in the body of the will was intended as her signature to the same. *Better v. Hirsch*, 614.

5. *Same.*

In such case it was not necessary for the attesting witnesses to sign the will in the presence of each other, since the statute does not so require. *Ib.*

6. *Holographic wills. Subscribed.*

Where a will is probated as a holographic will, it must be not only written, but "subscribed" by the testator under Code 1906, section 5078, so providing. *Ib.*

7. *Signature in body of will. Intention of testator.*

Whether the signature written in the body of a will in any case is the completed act or not, depends on the intention of the testator, and may be regarded as a question of fact to be answered and controlled by the testimony in each case. *Ib.*

8. *Statutes prescribing essentials of execution. Construction.*

Where the facts show an effort by the testator in good faith to execute a will, there should be no technical and hard rules of construction of the statute prescribing the essentials for the execution of a will, in order to defeat her purpose. *Ib.*

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WILLS—Continued.

9. *Construction. Interest devised.*

Where a testatrix devised to her two daughters the balance of her estate, real and personal, and provided that in case of their death, the children of each should inherit their mother's shares respectively, and in the case of the death of one without children, then the whole of the estate to go to the other, and in case of the death of both without children, the estate to go to the brothers and sisters of testatrix, then living. The contingency provided against was the death of either one of the daughters during the lifetime of the testatrix, and in the event of the daughters' survival of the testatrix they took a fee simple, regardless of the provisions of Code 1906, sections 2764-2765-2776-2778. *Nations v. C. & U. S. Mortgage Co.*, 741.

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